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Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC., ET AL.,
PETITIONERS,

vs.

J. EDWARD DAY, POSTMASTER GENERAL
OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. A]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,072

MANUAL ENTERPRISES, INC., a body corporate, TRIM ENTERPRISES, INC., a body corporate, GRECIAN GUILD, a body corporate, Appellants,

—v.—

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Joint Appendix

[fol. 1]

Excerpts From Transcript of Proceedings of April 21, 1959 Before the Post Office Department

P.O.D. No. 1/246

P.O.D. Docket No. 1/235

In the Matter concerning

MANUAL ENTERPRISES, INC. et al.,
and FIZEEK ENTERPRISES

Post Office Building
12th & Pennsylvania Avenue
Washington, D. C.
Room 5241
April 21, 1960
10:00 A.M.

Before: Raymond J. Kelly, Judicial Officer.

APPEARANCES:

Present: James F. Harding, Saul Mindel and Richard S. Farr, Assistant General Counsel, Attorneys For P.O. Dept.

Stanley M. Dietz, Attorney for the Respondent.

• • • • • • •

COLLOQUY BETWEEN JUDICIAL OFFICER AND COUNSEL

Mr. Mindel: Your Honor, I think I should make part of the record at this time before you proceed a certified copy of the court order under which we are moving here today at least so far as the time element is concerned. This is the order signed by Judge Tamm of the U. S. District Court here in Washington on April 14, 1960. In the matter of Manual Enterprise Inc. vs. Summerfield the Postmaster General (presenting same) present that in effect

suspends any further court contention upon a final order of the Post Office department in this matter by April 28th.

[Judicial Officer receiving and studying same.]

• • • • • • •

[fol. 2] Mr. Mindel: What further preliminary matter complainant here and General Counsel has filed his original complaint and two separate amendments. The first amendment was to strike from the caption the name of Fizeek Enterprises because it was not involved actually in the mailability case. The second amendment was to make the additional charge that the mailer is giving information as to where, how and from whom obscene matters may be obtained. I say that was filed I believe last Monday or last Friday. I have not seen an answer to that allegation from the mailer.

Mr. Dietz: Your Honor, this motion to amend complaint which is dated April 15, 1960 was received by me at my office April 19, 1960 at 10 o'clock in the morning. It merely states an amendment that the magazine provides information as to where, how and from whom obscene pictures may be obtained. We of course deny this and it goes into general denial because it is under the same statutes, Section 1461, it goes into the general denial that these magazines are obscene.

Mr. Mindel: It would come within that general area, Your Honor, because obviously those are two separate issues. The statutes prescribes various types of violations, one is the mailing of obscene matter and another rather (sic) is the mailing of information as to where obscene matter may be obtained. They are two separate issues.

However, as I understand counsel he is denying it specifically, its not covering a general, is that correct?

Mr. Dietz: That is correct.

Judicial Officer: The record will show that a motion to amend the complaint was allowed and that the mailer, petitioner denies generally the allegation, therein alleged. The allegation therein set forth.

• • • • • • •

Mr. Mindel: Your Honor, I don't know if the stipulation requires any explanation, I would just like to comment

though if any explanation is needed, that Mr. Dietz and I are agreed that the Fizeek Magazine will be in the trial today for the sole purpose during this stage of the trial [fol. 3] of receiving the testimony of the experts concerning the mailability of Fizeek Magazine, that magazine of course is not involved in the withholding action which is the principal thrust of the action that we are involved in today, and as a stipulation, provides, at some further date to be assigned, we will take up the other issues of fact in law involved in the proposed denial of the publishers application for entry of Fizeek Magazine as second class mail.

• • • • • • •

Mr. Mindel: If I may Your Honor at this time under stipulation with Mr. Dietz, I will put in evidence copies of the magazines which are involved in this joint proceedings here without any further identification. That is in line with the stipulation that Mr. Dietz has just formerly agreed upon with me, if I may I will identify these with the tentative numbers that I've given up for identification.

Judicial Officer: Very well.

Mr. Mindel: Exhibit 1 for identification is a copy of the April edition of Manual, Exhibit 2 May, 1960 issue of Trim —Exhibit 3 May 1960 of Grecian Guild Pictorial—Exhibit 4 copy of March 1960 issue of Trim—Exhibit 5 May 1960 Issue of Fizeek—

Judicial Officer: May what?

Mr. Mindel: I'm sorry, May 1950 Issue of Fizeek and the remaining exhibits at this time are on Fizeek so I won't repeat the name of them, Exhibit 6 July 1959, Exhibit 7 October 1959, Exhibit 8 December 1959, Exhibit 9 February 1960, Exhibit 10, April 1960, Exhibit 11 June 1960 of Fizeek. I offer these all in evidence at this time as joint exhibits.

Mr. Dietz: We have no objection to that.

• • • • • • •

Direct examination.

Mr. Mindel: State your full name for the record please.

A. Frank S. Caprio.

• • • • • • •

By Mr. Mindel:

Q. In your investigation of homosexuals and in your [fol. 4] dealings with homosexual patients hasn't there developed certain specific types of things which create sexual excitement in the homosexual?

A. Yes.

Q. Have they included pictorial representation as well as the printed text?

A. Yes.

Q. So that certain types of pictures am I correct in stating would have an especially stimulating effect upon the homosexual?

A. That is correct.

Q. Before the hearing you had of course an opportunity to examine various issues of these magazines an issue here including Manual and Trim, Fizeek and Grecian Guild Pictorial. You recall that?

A. Yes.

Q. Did you find in these magazines that there were pictures or any other matter, I speak especially of pictures that have this specially stimulating sexual effect upon the male homosexual?

A. Yes I did.

Q. Do you find many such pictures in these magazines?

A. Yes I did, plenty.

Q. I will ask you to deal first as a concrete example with the April 1960 issue of Manual which is given in exhibit Number 1.

(Witness examining this Issue.)

A. Yes.

• • • • • • •

Mr. Mindel: Would that be sexually exciting, sexual arousal type of appeal?

A. Yes, I've been told this by my homosexual patients who have collected magazines of this kind and because of the suggestion of the pubic hair and because of the loin cloth rather than the shorts of the bathing trunks this has a special appeal in the homosexual masturbation fantasies.

Q. Would you say that the use of the posing strap gives a special additional emphasis to the genital region and that is a factor and an attraction which you say the picture has for the homosexual?

A. Yes.

• • • • • • •

Q. Can you state as a general proposition, Doctor, what [fol. 5] elements of the pictures generally that you have seen in these magazines stand out and give that sexually exciting character to the pictures so far as the male homosexuals is concerned?

A. Well, I would say that these two pictures that I identified as Page 2 and Page 3 in contrast say to pictures on Page 8 and presumably Page 9 it is not marked, there is a marked difference between the pictures on these two pages and the pictures on these two pages. That these two pictures have men in the stand out bathing trunks, they have white (sic) lifting apparatus and these wouldn't necessarily be objectionable or necessarily exciting to a homosexual but by contrast these two pictures would be exciting to a male homosexual. These have no evidence of pubic hair, these pictures have evidence of pubic hair and this is exciting to male homosexuals. A picture of this kind without any trunks, "what page is that sir" witness this is page 12 of a male body in the nude would have special appeal to a homosexual, because of the nudity, and homosexuals are not interested in cows and chickens they are interested in the male body and naturally they get the sexual excitement by looking at pictures of nude males. This has also been reported by numerous homosexual patients who I've been treating. These pictures on page 18 and page 19 are also suggestive. They are pictures of nude males with some object in front of the genitals so as to not expose their genitals and this excites male homosexuals.

Q. You mean the fact of a partial but not complete exposure creates excitement.

A. That's true. This picture on page 20 again, the loin cloth, the so-called male G-string as has been referred to in literature, this excites a male homosexual, and this probably would. Oftentimes in order to increase excite-

ment for male homosexuals who buy magazines of this kind they will have a contrasting picture of a picture of a male in sailor's pants, tight fitting pants or bathing trunks and on the page opposite will have a nude form or a G-string and the two tends to make it more excitable to the male homosexual. These pictures on page 22 and page 23 have a special specific excitement and appeal for male homosexuals. You have on the top page a man in this position with a so-called G-string and below you also have a very suggestive pose wearing shoes but it is ridiculous only in that it has a very special appeal for male homosexuals. [fol. 6] Many male homosexuals have reported to psychiatrists that the picture of a nude male wearing shoes gives them added excitement and it comes under the category of fetishism. This definitely has an appeal.

• • • • • • •

This has—perhaps there is even a reason for it being in the center of the book, it accentuates the nude male body with buttocks. I see nothing about body building in this picture at all.

Mr. Mindel: Dr. Caprio, may I interrupt you; why does the exposure of the male body have an appeal to male homosexuals?

A. Because many male homosexuals resort to Ectomorphy Prurient and the buttocks of the male body has a special appeal to them because it stimulates fantasies of previous sexual activities wherein they engage in rectal intercourse. I think making a display of male bodies buttocks appeals to those homosexuals who resort to this type of sexual activity.

Q. What other type of sexual activity will the male homosexual resort to other than the annual (sic) intercourse.

A. Well male homosexuals may resort either to rectal intercourse or a mutual masturbation, mutual fondling of each others sex parts or they will resort to
Those three methods are the routine standard methods that most homosexuals, rectal, ectomorphy passage or H.O. fondling fondling of each others sex parts.

Q. You say you have found various pictures of these various magazines that you say would have an exciting

appeal to male homosexuals regardless of which of those classes of sexual outlet he prefers?

A. Yes.

I think that these pictures on page 30 and 31 are very suggestive poses. This particular one with the legs spread out with the G-string I think have a special appeal to men who are homosexually inclined.

Q. Would you define suggestive poses as you have just used the term?

A. Well this particular pose here with the legs spread out in fantasies homosexuals often resort to malgenital contacts with the passive partner in this particular position.

[fol. 7] Q. Would you call that a sort of an invitation pose?

A. An invitation pose is well put.

• • • • • • •

Witness: This is a very ridiculous picture on page 35 and the only reason that I feel that it is such a bizarre attire of this kind is that it has special appeal to certain homosexuals the so-called V-gown comparable to the V-gown in women the appeal to the homosexuals the so called equivalent to the V-dress in the woman which gives emphasis on the genital organs to focus the attention would have special appeal to homosexuals who are so operated mentally that this would arouse sexual fantasies, and I think that the bizarre picture of this kind would, could only be explained on the basis of appeal to homosexuals. A normal man would find this very ridiculous.

Q. And do you testify that it has such an appeal to homosexuals?

A. Yes it does. I think this picture on page 36 has absolutely nothing to do with weight lifting, has nothing to do with body building and it is the exposure of buttocks again, and I think this would also have the same appeal as I previously testified where the buttocks were exposed and this would have a special appeal for homosexuals. A normal well adjusted man does not need a picture of this kind in order to build up his muscles. I picked pictures on Page 39 for the same reasons as I previously testified,

the G-string with the emphasis on the genitals, and the background of the shrubbery which is not in a gymnasium has no weight-lifting apparatus. And for a nude man with a G-string on him for which I think this would find it more excitable to homosexuals again the fantasy of indulging in homosexual activities out in the forest or whether its shrubbery. This adds to their fantasies.

• • • • • • •

A. For the same reason that I previously stated. And I think on Page—these aren't numbered this probably would be 45, the ads, the advertisement. I think this attracts homosexuals to the top advertisement and to the bottom advertisement and the one on the left, the lower corner is a picture of a nude male with his part of his buttock [fol. 8] exposed and the other one is a suggestive pose of the G-string I think also, the pictures in those advertisements might be considered exciting to homosexuals.

Q. You say the total ad though in each of those has such an attraction to homosexuals especially. Is that your testimony?

A. Yes.

Q. You base it on the picture alone Doctor?

A. I base it on the picture alone and I base it on the context of the magazine in general.

I have come across very little weight-lifting apparatus in this whole thing. There is nothing that builds muscles here, nothing that builds muscles here (turning pages) nothing that builds muscles here and these two pages do have some weight-lifting apparatus, this doesn't, this doesn't, (turning pages) this doesn't I am sure he is not trying to lift that chair for a development of his muscles, this doesn't, this doesn't, this doesn't, this doesn't, this doesn't, and this doesn't, this doesn't (turning pages) and so on and so I would conclude that the theme of this particular publication is to emphasize the nude male body with emphasis on the genitals wearing the G-string rather than any body building or weight-lifting motivation.

So in answer to that question I would make that conclusion on the general context of the entire publication rather than on just the picture alone.

Q. Dr. Caprio, have you had heterosexual patients also?

A. Yes, numerous.

Q. And have you discussed with them also the question of what's sexual excitement?

A. Yes.

Q. From your experience Doctor and your investigations and general scientific background could you come to any conclusion as to the likely audience for this kind of a magazine.

A. Yes. I believe that a magazine of this kind would have a special appeal to male homosexuals and would have a specially male homosexuals who have actually indulged in homosexual practices and who admittedly claimed they are homosexuals, but it also has a appeal to young men, 18 years old, 17 years old who we might classify as borderline sexual cases where they haven't had intercourse with women, they know about homosexuality, they have what [fol. 9] we call light homosexual components within them and because of conflicts they have always tried to fight back homosexual tendencies in themselves and I think that that group, seeing pictures of this kind, that publications of this kind could very well push them into homosexuality only because mentally they find themselves conscious of the male body and I think in that respect often it lifts these young men who are not actually homosexuals but are like this and out of curiosity they look through magazines of this kind and before they know it they start masturbating, and instead of thinking of women when they masturbate they wonder whether their penis is as big as the penis in these male models and they develop all kinds of conflicts and they come to us and say "Dr. Caprio, I don't feel that maybe I should marry" and I say why, and 18 year old boy "well I don't feel that I am developed, I don't feel that I am strong. I came across a muscle building magazine I see some of those men in there and I think they must have real large penises and do you think I'm a queer?" "What makes you think you're a queer?" "Well sometimes I am attracted by these pictures of muscle men I wish I could be like that. I wish I could have their muscles." and they start masturbating with images of the kind of physique that they think they would like to have. I think in this respect it does tremendous harm and I question them I

say "do you buy such magazines?" and my clinical experience has been that they do and I tell them in helping them that their normal sexual adjustment, you have got to stop buying these magazines, you've got to stop looking at these male figures or the so-called muscle men if you eventually want to make a good normal sexual adjustment. You can't masturbate thinking of a man's penis and a man's body and hope to make a normal sexual adjustment.

Mr. Mindel: What would be the likely lasting effect upon this 18 year old assuming he doesn't come to a psychiatrist for treatment.

• • • • • • •

A. Yes, I think that it can very lasting damage so much so—I think that comparable to the damage that fantasies of this kind can push an individual into homosexuality, we feel that a man who exposes himself to a young girl, say 16 years old and unzips his trousers and shows this girl [fol. 10] his erected penis, that such an injury psychologically to that girl might keep her from desiring to marry or might develop frigidity where she is unable to enjoy sexual relations in the event that she should marry. And we know that this is true because we have patients who tell us "Dr. Caprio do you suppose the reason I don't enjoy sex relations with my husband is because when I was 11 years old, 15 years old, some man exposed his penis to me and I became frightened and it left a very bad impression on me" or I may get a man who tells me that he isn't functioning well with his wife and I ask him why and he tells me because he had been seduced homosexually when he was 17 years old when he indulged in homosexual activities voluntarily because of this kind of stimulation. So we know from clinical experience that these damages can be lasting up to such time as they seek treatment and then we have got to undo this damage. We've got to undo this damage by going back into their childhood and taking it year by year by year and offsetting this type of influence.

• • • • • • •

Q. Doctor I will now hand you the May 1960 issue of Trim which is marked for identification, exhibit 2—strike that, it has been received and marked as exhibit 2; I draw

your attention to the picture on page 18 of this magazine which you will see is a picture of a man in the nude except that his trousers are only partly down one leg. Would that particular arrangement or disarrangement of clothing which you see have any special sexual arousal upon the male homosexual?

A. Very much so.

Q. Why is that Doctor?

A. Well, I think that not only psychiatrists feel this way but men in general feel this way that oftentimes a woman who is about to undress her buttocks are exposed and she is in the process of undressing, that this sometimes carries greater excitement than a completely nude individual and on that premise to a homosexual, the suggestion that he is taking his clothes off gives this added excitement for the same reason behind a woman in a strip-tease.

Q. Would that apply to the picture on the opposing page, sir?

A. This would also apply for the same reason, Sir, on page 19.

[fol. 11]

• • • • • • •

Q. I call your attention now to the two pictures of a model identified here as Tom DeCarlo on pages 34 and 35 and ask you to say whether there is any specially significant factor in those pictures so far as the area of your testimony is concerned and ipso facto on the male homosexual.

A. Yes. There are many homosexuals who have peculiar fantasies that differ from fantasies of other homosexuals. And to cite a particular type of sexual deviation within the whole sphere of sexual deviations, some homosexuals have a peculiar susceptibility to pictures of violence where an individual is threatening another male with a sword or an individual is pointing a gun or an individual is whipping someone and he's in the nude with just high leather boots or an individual that is in chains.

I have had homosexual patients who have told me that when they had made an arrangement to indulge in a homosexual experience with a man that they pick up in a public park or in a lavatory they would ask this man to tie them to a chair or to whip them with their belts, they had to in

their fantasy be subjected to the fantasy of being chained and being tied and I think that pictures of this kind would have the special appeal to those homosexuals who have a further complication by getting added sexual excitement by seeing a nude or semi-nude of a man in a G-string of this kind and they masturbate and this gives them added excitement, we know actually from clinical cases reports that pictures of this type give medical excitement.

Q. That would be what I correctively say a Masochistic who would have such a reaction to that picture?

A. Yes and then you have the homosexual sadist which is the other side of the coin where he doesn't want to be tied down but he wants to inflict the act of violence and punishment. And in proof of this is that in many cheap magazines, I think all of this mayhem, cross advertisements of whipping scenes and this appeals to homosexuals who have the act of sadistic instinct to inflict punishment on other individuals.

Q. Well among the homosexuals is there such a thing [fol. 12] as an active partner and the other is a submissive partner, a passive partner?

A. Yes. And then there are individuals who reciprocate who are mutually responsible.

Q. You have discussed briefly the problem of fetishism, I call your attention to an advertisement on page 46 of this advertisement, an advertisement of one who calls himself, D. Pagaf which has—

Judicial Officer: That is exhibit 2?

Mr. Mindel: Yes, Sir, same magazine exhibit 2 and I call your attention to that picture and ask you if that would be a valid example of illustrations of fetishism.

A. Yes.

Q. Say why?

A. I have had many homosexuals and I have observed other psychiatrists working in this special field wherein they have similar experiences wherein a homosexual will relate that he gets added excitement wearing say a leather jacket or a simulated leather jacket or be partially dressed with some garment and then down from the waist be naked or with his shoes on and we classify this particular type

of sexual deviation as fetishism and I think that this is quite clearly obvious that no individual, normal man who wants to develop his body is going to learn anything about body building by seeing a man with his rear end exposed and wear a jacket that is absolutely ridiculous.

Q. Would such exposure as you find in that picture have a special and or erotic appeal to a homosexual?

A. Yes, it would stimulate tendencies of a rectal intercourse unless they are trying to see the jacket—maybe they are advertising the jacket.

Q. Apparently not Doctor as it said send three dollars for a sample set of prints.

The next exhibit we have here is Grecian Guild Pictorial for May 1960; Doctor I would like for you to look through here and just say whether you have whether you would apply the comments that you have made heretofore which were of a general nature to these pictures that you find in this magazine?

• • • • • • •

Witness: Yes, I would say as to this particular publica-[fol. 13] tion, even focuses greater attention on abnormal sexual fantasies and have a special appeal to homosexuals. This particular pose exposure of the buttocks—why this man has a helmet and only has a G-string is something I can't appreciate in connection with the art of body building, and so we have to conclude that it is a matter of fetishism that he has this special excitement.

Again I don't see the necessity or the function of the sword that the man in the G-string in connection with body building.

Q. Well what significance would you attach to it insofar as an appeal to a male homosexual is concerned?

A. Well psychoanalysts who have done much research in homosexuality, they base the reason for many of these fantasies which homosexuals develop, masochistic fantasies, sadistic fantasies in that the feeling of being penetrated as the sword symbolizes the person who uses the sword, not to hit a person over the head, you use the sword to stab someone to penetrate. It is a penetrating weapon and in rectal intercourse actually the penis serves in this

capacity. It is a penetration of the anus. So in their fantasy they get sexual excitement feeling that they are overpowered they are penetrated from behind and many of them have terrible nightmares feeling that somebody is trying to stab them with a knife from behind, and psychoanalysts have actually proven that this is not wild speculation but it is based on actual clinical evidence that these patients are afraid of being homosexually seduced by means of the rectum and they have such dreams of having the sword come from the behind. And I think that pictures of this kind are explained on that basis and I think that is the reason that you find such pictures of chains and swords, that these individuals have read up on books of sexual pathology and they know what appeals and this is the reason that you find it. This again is the picture of the chains which clearly dashes a man in agony, here is a very anxious expression on his face struggling against chains, which is what I pointed out earlier that a certain type of homosexual will get added sexual excitement looking at this picture otherwise how would you explain why a picture of this kind would be in such a publication if there didn't have to be some connection with homosexual sex life.

[fol. 14] Q. Well you do find Doctor from your own experience and study that that is the likely effect of such a picture upon the homosexual, the effect you have just described?

A. Yes. This is another picture again that would appeal to homosexuals.

• • • • • • •

A. This is page 14 of the nude male with a glass in bed, a nude male in bed holding a glass. Again we have the same theme or idea of the helmet and the gladiator and the sword symbolizing power.

Q. Have you noticed in examining these magazines a common recurrence of the sword as a factor in the pictures.

A. Yes here and there you'll find this sword. Here is another one with the sword being paired with the gladiator.

Many homosexuals are very weak. They suffer from a terrific sense of inferiority, sexual inferiority. In fact this is one of the causes of homosexuality. They are afraid

that they cannot satisfy a woman. They cannot function properly and the fear of losing their erection with a woman makes them turn to their own sex and compensating for their inferiority they have to have fantasies with men of power, men with a whip, men with a sword, gladiators and they identify themselves with these nude pictures and this gives them sexual excitement. And the harm does (sic) is that they remain at this level. They remain as homosexuals, they don't have a chinaman's chance of becoming cured as long as they are constantly stimulated by this type of picture.

Q. You notice the title of the magazine you have in your hand Doctor, Grecian Guild Pictorial and I call your attention to the legend on the top of Page 2. Would you comment as to whether you find any special significance there to the male homosexual and would you first read it, I neglected to ask you it. I'm sorry.

A. Yes, it is a picture of a so-called frieze on presumably one of the grecian buildings and the quote underneath is we are all Greeks. Our laws, our literature, our religion, our arts had their roots in Greece and Shelley, I presume Shelley the poet.

Q. Yes and my question was whether you see any special significance in any part of that with regard to male homosexuals.

A. Yes.

[fol. 15] Many homosexuals refer to homosexuals as Greeks or a Turk. It is no reflection on the country of Greece or the people who are well adjusted living in Greece, but unfortunately historically there is some evidence that homosexuality had been practiced among Greeks and Socrates the Greek Philosopher was supposed to have seduced young boys for which he was given the death sentence by drinking the poison hemlock and this came on as a legend if it is not factual that the Greeks indulged in homosexuality, and this also applied to female homosexuality in that Sappho was a Greek poetess who also seduced many young girls to lesbian love and this also is Grecian in art so the connection of this quote the Greeks and the general nature of the picture says this correlation between the Greek love or homosexual love.

Q. The term love as you have just used it and explained it would that be limited to one manifestation and one type of activity for the male homosexual rather than another?

A. Well different homosexuals have different versions. Some claim that a Turk is an individual who takes the active role in rectal intercourse and some refer to Greek love as masochistic contacts, but I would say that predominant feeling among most homosexuals is that Greek love refers to rectal intercourse.

Q. I hand you now exhibit 4 and invite your attention to a picture—these pages aren't numbered Your Honor that is why I am hesitating.

Mr. Dietz: We are on exhibit 4 now?

Mr. Mindel: Right.

This would be on page 11, and I ask if you find any special significant factors in that picture with regard to the male homosexual?

A. No as such, in all fairness to this whole discussion, I don't see anything particularly objectionable to these two pictures.

Q. Would you turn to page 30 of this same exhibit and my question would be the same.

A. Yes. This particular picture on Page 30, I think that the position of this man even though he does have trunks on is such that it creates an emphasis on the genitals as though his penis was in a state of semi-erection and this is very excitable to homosexuals. Homosexuals, if in their fantasy they see any kind of a picture where they think [fol. 16] that the penis is in semi-erect or erect state can add an excitement. I think that this is quite obvious to anyone that the genitals are emphasized here.

Q. Have you found such emphasis in the other pictures that you have examined in this or in any of the other magazines which is an issue in this case.

A. I wouldn't find anything objectionable by contrast in this other picture here below but I would on this picture and not on this.

Q. Doctor this emphasis which you have just described regarding the picture on page 30 because of the state of erection or semi-erection which you say you find in that

picture, have you found a similar emphasis because of such apparent state of erection or some erection in other pictures that you have examined in this magazine or the other magazines at issue here.

A. Yes, Yes. I think for example these two pictures there are some.

Mr. Dietz: What page is that please?

Witness: Presumably this is 32 they are not marked, but by previous pages this should be 32 and 33 and I think again here the Bikini makes it quite obvious that the genitals are emphasized.

Q. Do you find any of the latter pages of that magazine, Doctor?

A. Yes I think this is quite obvious on page 39 in the lower right corner I think there is some emphasis on genitals accentuation of a semi-erect penis and again as I previously stated, having pictures on one page with tight sailors trunk pants or any other tight fitting pants and on the opposite page of this type I think this is added sexual excitement to a homosexual.

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[fol. 20] Q. And do I understand correctly your testimony, Doctor that you would say to each and all of these magazines in these issues of the magazines that are presently in evidence which you have reviewed before the hearing and just now in the morning session of the hearing, do you find that their dominant effect is one of sexually arousing appeal to the male homosexual and that to the male homosexual is the audience that this kind of a magazine will attract according to your experience and your training in this study and all the rest of your scientific background?

A. Yes, I do.

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[fol. 27] Q. Doctor Caprio, a few minutes ago you were testifying of the advertising items we had in the magazines and you also made a general statement concerning the advertising we find in all of the magazines we have before us here. You will note I now hand you exhibit 1 again the April Issue of Manual on Page 44, Manual

Directory and it says Manual Directory—listed below are the artists and photographers with whose work Manual is familiar and urges its readers to support. Send one dollar for catalog and tell them you saw their work in Manual, then it has a list of all of these names—trade names I think most of them are—and their addresses.

(Witness examining)

That sort of directory, I think appears in all—almost all of these magazines. Would you say, what would you say Doctor as to the likely appeal of the advertising in these magazines, the Directory and the separate display ads with respect to this homosexual readership that we have discussed here?

A. Again I quite strongly feel that it is mainly directed towards exciting homosexual groups in this country.

Q. And would you say as you did on a specific item before that it would excite sexually aroused interest and want them to purchase the pictures that were advertised?

A. Yes that's right. I base that on actual evidence that I have gotten from homosexual patients who I have gotten over many years who have told me, I have one patient he is married now—for treatment and prior to marriage by gosh he brought me a suitcase of this sort of material of men in G-strings, and some of them came from foreign countries, the poor fellow was addicted to masturbating looking at these pictures and he was all fouled up, had a severe anxiety neuroses and didn't quite know whether this made him a homosexual but he was addicted to this sort of mailing by sending through the mail money and getting pictures of this kind.

[fol. 28] Q. And you think this would be a typical reaction of the male homosexual in reading this magazine or these magazines?

A. That's right.

Q. Just now you referred to causing the reader that you had reference to, to masturbate. Did you intend to limit the sexual outlet of the sexually aroused homo aroused by the pictures in these magazines to that kind of sexual activity.

A. I have had patients who had sent for pictures so many

pictures of nude males and upon receiving them it stimulated them into seeking opportunities for indulging in homosexuality where actually the pictures the nude pictures of the nude males triggered off this lightened homosexual component into expressing it and threw them into homosexuality out of the pictures alone.

Q. And what would you say as to the effect upon the so-called practicing established homosexual rather than one whose homosexuality was latent up to that point?

A. Well, unfortunately, it does damage in that it keeps him constantly homosexually minded by constantly fixated on his own sex. He doesn't have a chance to even develop ideas of being cured going to a psychiatrist for treatment and he becomes addicted just (as) you would become addicted to morphine or drugs. These poor fellows can't help themselves and they take their money and they send away for these pictures and they masturbate and they go out and drink beer in some tavern and pick up some fellow and have a homosexual experience and then on money they send their three dollars or six dollars for more pictures then they masturbate and then they go to the beer tavern and pick up another fellow or in the park—they send out six dollars for six more different pictures of different men and this goes on and on. This has been told to us so what conclusion can we come to as a psychiatrist between the relationship of cause and effect. And they actually bring pictures to our office and show [illegible] say here I sent for these pictures from this company.

Mr. Mindel: That is all on direct, Your Honor.

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Cross examination.

By Mr. Dietz:

[fol. 29] Dr. Caprio, you have adverted to certain things, characteristics contained in the photographs of these magazines which you say appeal to homosexual, to sexually arouse a homosexual.

I ask you Sir is this not a fact that just a plain photograph of a man with a hairy chest could appeal to some homosexuals and sexually arouse them?

A. Not necessarily.

Q. But it could, couldn't it, Sir?

A. Anything, we could have a war.

Q. And anything at all, anything in this room. Anything the Judge is doing could appeal to a sexual deviate to arouse him now is that not true, Sir?

A. I don't think that this is a valid premise because when you say could, you are putting me in a position where anything is possible. I could have a heart attack in the next half hour. If I would say no to this, this would be stupid of me I have to say yes that anything is possible. If you ask me if anything is possible in such a broad term, that a homosexual might be aroused by a statue of a man on a horse in a public park.

Q. All right now, Sir, is my smoking a cigar not something that generally could arouse a homosexual?

A. No.

Q. It's not?

A. No, because it gets into the ridiculous. And you have got to draw a line some place as to what is logical and what possibly could happen and what is a ridiculous assumption and an unusual exception.

Q. All right now, do you limit then the things that arouse a homosexual as a picture of a man wearing shoes when he has little or no other clothes on? A photograph of a man in tight pants? A rear view photograph of a nude or possibly also the photograph of someone wearing a V-shaped piece of clothing? Are those the things that are the only things that are sexual impulses in homosexuals?

A. I didn't say that.

Q. Well I ask you, Sir, if you do say that answer.

A. No, I don't say that.

Q. Well, then, will you please list for me, Sir, what things in your opinion arouse sexual desires in a homosexual?

A. It would take all afternoon.

Q. That is just the point it would take all afternoon. There are so many things that it would take all afternoon?

A. Some are probable and some are improbable in degrees of excitement.

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[fol. 30] Mr. Mindel: All right under non-sexual sources of erotic response among pre-adolescent and younger adolescent boys Mr. Kinsey has this list under chiefly physical "Sitting in class, friction with clothing, taking a shower, punishment, accidents, electric shock, fast elevator rides, carnival rides, ferris wheel, fast sled riding, fast bicycle riding, fast car driving, skiing, airplane rides, a sudden change in environment, sitting in church, motion of car or bus, a skidding car, sitting in warm sand, urinating, boxing and wrestling, high dives, riding horse back and swimming."

Now that is the list of chiefly physical sources of erotic responses listed by Mr. Kinsey or Dr. Kinsey.

Q. Do you agree with that, these things that I have listed?

A. I don't disagree. And I think I can save you a lot of time. I met Dr. Kinsey, I was invited by him to visit him at Indiana University, I am acquainted with his ideas and I think that what you have just recited absolutely has no bearing on the point that I have tried to make. That while Dr. Kinsey was correct that anything was possible of exciting either a woman or a man sexually—we have patients who are excited by religious figures which is a very bizarre source of stimulation and you can add to this thing people who have even been sexually stimulated in church but this wouldn't prove that a flagrant exposure of nude males in the United States to men with emphasis on the genitals that because a person might be sexually stimulated by seeing two dogs having intercourse which can't be helped, how are you going to talk to the dogs, say look, don't have intercourse so that you don't make any suggestion to young boys. This is ridiculous so of course there are going to be two dogs that are going to have intercourse so some 17 year old boy might get sexually aroused. There are a lot of things that can't be helped as a source of sexual stimulation, this is part of life. A person passing a burlesque show advertising semi-nude women if young boys passes by an advertisement of a night club act, goes home and masturbates what does this prove? Are you going to tell all the night clubs all over

the United States to put a cloth in front of these advertisements? This can't be helped. You got to be reasonable. There are sources of sexual stimulation that cannot be eliminated and there are many of such sources of sexual stimulation. But there is such a thing as sex exploitation [fol. 31] where you deliberately by mail send pictures of nude men or semi-nude men with emphasis on the genital organs that does terrific damage on the development of young adolescents and this I don't think Dr. Kinsey would have any quarrel with. So what have you proven that a person can be sexually stimulated watching two dogs, a cow and a bull?

• • • • • • •

Q. In these magazines which you have looked at today, the exhibits in evidence have you seen one or any photograph of male penis?

A. No.

Q. Do you consider a photograph of a male penis to be sexually stimulating to the homosexual.

A. Yes it would.

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Mr. Dietz: May I continue.

Judicial Officer: Yes, Sir.

By Mr. Dietz:

Q. Are you familiar with this book Helios?

A. I am not with that particular Issue.

Q. But you are familiar with that nudist magazine?

A. Yes.

Q. Do you receive that magazine?

A. No.

Q. Have you ever bought one?

A. No.

Q. I show you this Sunshine and Health magazine and ask you to glance through it and look at the photographs—oh first may I strike that and ask you this question: Is the same criteria for a lesbian as there is for a homosexual that there are certain things that appeal to the sexual de-

sires of a lesbian that are different than certain things that might appeal to the normal person?

A. Yes.

Q. All right. Now will you look at that magazine please.

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Mr. Dietz: Have you looked through that magazine?

A. Yes.

Q. Have you seen anything in that magazine that would appeal to the prurient or to the sexual desires or arouse sexual thoughts either a homosexual or a lesbian?

A. Yes, it would.

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[fol. 32] Witness: I think a magazine of this kind definitely would appeal to the prurient interest of some people. I think it would be very inaccurate of me to say that it wouldn't appeal to the prurient interest and if I may comment, my experience with magazines of nudist colonies, they have actually proved my point of hiring professional models that were beautiful to pose in the nude. They never held a membership to a nudist colony and they were definitely hired for the purpose of appealing to the sexual interest of people who bought the magazine.

• • • • • • •

Q. All right. Now I show you this nudist calendar and ask you to look through that and see if there is anything in that that could appeal or would appeal to lust or sexual arousement of a lesbian or a homosexual?

A. Yes, I would have to be truthful.

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Mr. Dietz: I ask you Doctor, to look at this photograph of March 14, 1960 Issue of Time Magazine—this advertisement. (Witness so doing.)

Q. Did you look at it?

A. Yes.

Q. In your opinion would that photograph appeal to arousing lustful thoughts in a homosexual?

A. Not necessarily.

Q. Could it?

A. It could, Yes, taking in exceptions.

Q. And there are so many deviations among homosexuals that actually no one could really come in and testify as to all the different things that could appeal to arousing sexual thoughts, lustful thoughts of the homosexual. Now is that correct?

A. I think we could pin it down to the major things that usually appeal to homosexuals.

Q. All right major and minor, no one man would be able to testify to all the things would he?

A. Well he would have to make a study of 2 billion people.

Q. Have you ever made any study of weight lifting?

A. No, I haven't.

Q. You have never done that yourself, weight lifting or anything like that body building?

A. I haven't specifically—No.

Q. You actually don't know that, Sir, what interests a [fol. 33] body builder or a weight lifter as far as his concern for development of his own body, do you, Sir?

A. Only from patients of mine who have—

Q. All your patients have been sick people are they not, Sir? 'Isn't that why you treat them?

A. Who is sick? It's a matter of degree.

Q. Do you consider yourself sick?

A. I would consider myself partially neurotic to be truthful because I have written in my books that all human beings have their frailties. If by normality you mean perfection, I am not a normal person if you regard me as a perfect person, I am not perfect person and I have my faults and frailties and you have so we are all partially neurotic and it is a matter of degree of neuroses and degree of abnormality. And what is normal in one part of the world isn't normal in another part of the world so normality is a very relative term.

Q. All right now, Dr. Caprio, you are familiar with Dr. George Henry, you testified to that before.

A. Yes, I am.

Q. Just so that the record is straight, and to show that there are other theories besides what you have stated here regarding what causes homosexualism, and I ask you, Sir,

whether Dr. George Henry does not propose a theory that homosexuality is strictly a glandular matter that reading books or looking at pictures would have nothing to do with a person becoming a homosexual and actually Dr. George Henry conducted extensive tests—

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Mr. Dietz: I am asking if he is familiar with the work of George Henry two volume book sexual deviation.

Q. Are you familiar with them?

A. Yes, I'm not only familiar with them I had the opportunity of knowing him personally.

Q. Besides so from your testimony before and to this statement that you have made, a scientifically erroneously statement I don't think that Dr. George Henry would stand for being misquoted. He does not subscribe to this theory. He does not.

A. No, this is in my own field of work. It is no law it is psychiatry and I know what George Henry believes.

Q. Did George Henry conduct extensive examinations, [fol. 34] urine analysis, conducting urine analysis of patients to see if male and female hormones in the urine and did he not conduct extensive blood tests.

A. There are many besides Dr. George Henry, Dr. Carl Bowman for one in San Francisco have conducted to by trying to decipher whether or not there is any organic basis for homosexuality by glandular, the greatest authorities of the United States as of today including Dr. Bowman and including Dr. Henry who has made this very research experiment that you have referred to have come to the conclusion that homosexuality by and large is an acquired sexual elaboration and that in some instances they have found a certain glandular or defect today it is still in the experimental stage where they are still conducting experiments in California and in other parts of the United States in order to find the connection between the glandular defect and the homosexuality but this isn't an established fact by any means.

Q. All right so that, Sir, you would have to say that since they are still conducting experiments, it is still a

matter of tremendous controversy in the medical profession is that not so, Sir?

A. I would say it is controversy but not tremendous controversy.

Q. All right, well how about Dr. Sheldon from Harvard, the University, are you familiar with that gentleman or his works?

A. Yes.

Q. Now I ask you, Sir, is it not a fact that Dr. Sheldon's theory is strictly Ectomorph and Endomorph as the causing of homosexuality?

A. That is his theory.

Q. And that is entirely contrary to what you have stated in here today is that correct?

A. That is just his theory.

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Q. Sir, based upon what you have just said, would you say that everyone that purchases this type of magazine is a homosexual. (holding up Manual)

A. No, when you ask me a question of this kind whether everyone who purchases a magazine of this kind is abnormal, I would say no to that. I would have to be truthful because—

Q. Because you are under oath if nothing else.

A. Because normal people are curious and a normal person might pick up a magazine of this kind and bring it home [fol. 35] and browse through it, but he may not keep buying it. Or he may be an artist, maybe he does want to draw a nude male and he sees this magazine and maybe he says this magazine has the very thing that I am looking for—but this is an exception, this isn't the rule.

• • • • • • •

Q. Yes and also look at this magazine 1—the homosexual viewpoint. (Witness looking.)

Mr. Dietz: I might state, Your Honor, this magazine 1 is the magazine the basis of the decision of the Supreme Court of the United States, one Ink vs. Oleson, on the mailability.

By Mr. Dietz:

Q. Have you had opportunity to look at them?

A. Yes.

Q. All right now what you have seen in those magazines, Sir, in your opinion the contents there would appeal to the homosexual?

A. Yes. I would say that this particular picture would appeal to the prurient interest of the homosexual.

Q. How about the pictures on the next page, keeping in mind will you please, Doctor, that these magazines by their own context have admittedly are being beamed at homosexuals. Do you think the other pictures would appeal to the prurient interest of the homosexual?

A. This might appeal to the prurient interest. This may not.

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[fol. 36] Mr. Dietz: All right, Dr. Caprio, take these pictures starting with the cover on this exhibit number 7. Does the front cover depict to you a well developed or an underdeveloped man. This is another matter, I think. If you were asking me to evaluate pictures in terms of muscular development I take this as an entirely different issue.

Q. Well, all right, I will ask you, Sir, if you will look through this book and tell me if you can, Sir, any photograph of any man that you would, as a Doctor of medicine consider under-developed.

Judicial Officer: I don't think that that is an issue here at all.

A. I am not an expert on physical development.

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Q. Have you seen any other physique magazine that is sold in the United States?

A. I may have.

Q. You may have.

A. Yes.

Q. Well, I ask you, Sir, to just briefly glance through this collection of Physique Male magazines (Witness looking through some magazines).

[fol. 37]

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Q. Doctor, you have very quickly looked through these examples of the Physique magazines I have shown you. Did you see in these magazines opposing straps comparable to the type we have.

A. Yes, I have.

Q. Did you see in these magazines a rear view nude photographs the same as we have?

A. Yes, I have.

Q. And you have seen just about every type of picture that we have had that you have testified to today in our magazines or these magazines. Now is that correct?

A. That's correct.

Q. Now Doctor, you testified before regarding this exhibit number 1, page 35—this is the V-shaped picture, Your Honor, regarding this picture that that would appeal to lustful thoughts in a homosexual. Now I show you from Revels number 5, $1.00 which was purchased today in the District of Columbia and ask you if that was the V-shape that you were referring to, the V-shaped garment that you were referring to?

A. Yes I think the analogy is correct.

Q. All right and this is the same type of photograph in this magazine as you have referred to in our magazine.

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Q. I show you now exhibit number 2 which is in evidence these two photographs which you referred to before on pages 18 and 19 and first of all may I ask you a question, Doctor, on the photograph on page 18. Is that man putting on his pants or taking off his pants?

A. Well at best I can only give a scientific guess.

Q. All right scientific guess.

A. Scientific guess would be that he is taking them off.

Q. And I believe you testified that that picture of a man undressing taking off his clothes, even though it is based upon a guess, would be appealing to the sexual desires of a homosexual?

A. Yes.

Q. All right, I show you this photograph of Sprite, Vol. 1, a book we purchased here this morning here in the District

of Columbia, a photograph, a full page photograph. Now, does that depict a young woman undressing?

A. It does.

[fol. 38] Q. And would that picture appeal to the prurient interests and desires of a lesbian?

A. Not particularly a lesbian, a man.

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Q. Doctor did you seen any photographs in any of our magazines of a man whipping a woman or another man?

A. No.

Q. I have a couple of other questions. Did you see any photographs in any of our magazines of a man or a woman fooling around sexually with an animal?

A. No.

Q. All right. Now Doctor do you know what would stimulate a lesbian?

A. I believe I know a few things that stimulate lesbians.

Q. All right, are there just as many things to stimulate a lesbian as it could stimulate a homosexual?

A. I have never made an accurate statistical study between a homosexual group, male homosexual group and a lesbian to give you an accurate answer to whether or not there is just as many things that would stimulate a male homosexual as would stimulate a lesbian.

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Mr. Dietz: Your Honor this man has testified as to the effect upon particularly susceptible groups, homosexuals. I think that is a fair interpretation of his testimony and surely if your honor cannot correlate lesbians as being a particularly susceptible group the same as homosexuals.

Judicial Officer: I don't think we have the question here before us at all on the question of lesbians or even of man and animals. That is a—

Mr. Dietz: This is what the Doctor brought up, Your Honor.

Judicial Officer: I can separate the wheat from the chaff, I think.

Mr. Dietz: I'm sure you can.

Judicial Officer: I think we are losing sight of the squirrel, let's keep hunting the squirrel in this case and not go

all over, we can't solve every riddle of human depravity here today, I don't think.

(Mr. Dietz resuming cross-examination.)

Q. Now, Doctor, your testimony was that photographs of nude men out in the woods so to speak would be sexually stimulating or arousing to a homosexual, is that correct?

A. That is correct.

[fol. 39] Q. I show you now the next page on Sprite, a photograph and ask you if that is not also the same type of photograph here, a nude female out in the woods, misty flowers—

Mr. Mindel: The doctor was not testifying on direct concerning pictures of nude females.

Judicial Officer: I don't think that we can say that he was on direct.

Mr. Dietz: Your Honor realize that I differ in my opinion.

Judicial Officer: You have a right to.

Mr. Dietz: Based upon Your Honor's ruling and conformance thereof I think it is fair that I make a profert this time to show your honor that I would have interrogated the Doctor regarding nude female photographs in the Book—Blondes Brunettes and Redheads, Vols. 1 and 2 which was purchased today here in the District of Columbia, nude photographs in Playboy Magazine which was purchased today here in the District of Columbia at a cost of 50 cents to my client and in Modern Man the adult picture magazine May 1960 issue which was purchased here in the District of Columbia. The point being, Your Honor, if the Doctor was to testify as to the effect upon any particular susceptible groups that we may be allowed to show the correlated group on one hand you have homosexuals on the other hand you have lesbians.

* * * * * * *

Mr. Dietz: My point and on the record is that this stuff is available here in the District of Columbia as part of the contemporary community standards of what is sold and purchased here in the District of Columbia and available to lesbians, normal women, available to men, to homo-

sexuals, just the same way our magazines are on the newsstands here in the District of Columbia and available for sale and purchased by any of those aforementioned groups.

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(Dietz resuming questioning.)

Q. On exhibit number 2, on page 34 and 35 you testified before because of the chains that these photographs would appeal to the sexual desires of this particularly susceptible [fol. 40] group of homosexuals and in exhibit number 3 you testified as to pages 8 and 9, a view of a man on page 8 of a man in chains and page 9 with a sword. I ask you Doctor if you are familiar with the Greek Fable of Prometheus?

A. No, I am not too astute on Greek mythology.

Q. Well, Doctor, if I told you that the Greek Prometheus was the God who thought he deceived the King of the Gods and was chained, entirely chained by Zeus and then broke his chains, that's part of the Greek fable his breaking away from the bondage, the chain gave us our light and our day and is so depicted in these magazines. Do you still agree that any photograph of a person in chains of a male as depicted in these magazines would appeal to the prurient interest of this particularly susceptible group, the homosexual.

A. Even more so. I think it is a clever gimmick to exploit Greek Mythology in an effort to appeal to homosexuals by making use of something, a hook to hang their hat on, digging up something in Greek Mythology that might appeal to the Masochistic and sadistic components of the homosexual.

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Redirect examination.

By Mr. Mindel:

Q. Dr Caprio, a question was asked of you earlier in cross-examination as to whether or not any of the pictures —in Mr. Womacks' magazine the publisher of various magazines, whether you saw the penis in any of these

pictures and you answered no. Would you answer the same if the question were did you see any of the penis clearly outlined in the posing strap or any other garment appearing on the model?

A. In this batch here?

Q. In the magazines that are in issue here, Trim and Manual and Fizeek?

A. Yes.

Q. Your answer is Yes you have seen the penis so outlined in the various pictures of these magazines?

A. Yes.

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[fol. 41] Direct examination.

By Mr. Farr:

Q. State your name?

A. Joseph B. McGovern.

Q. What is your address?

A. 3734 McKinley St. N.W., Washington, D. C.

Q. I understand you hold a PHD from Catholic University?

A. Yes.

Q. What subject?

A. Clinical psychology.

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Mr. Farr: Now you have previously testified, Doctor, that you have had occasion to read and study these magazines, is that correct?

A. Yes.

Q. In your opinion for whom would these magazines be designed or to whom would they be directed?

A. They are directed primarily towards a special group and this group may be characterized by the fact that the majority perhaps more than 90 percent or 95 percent are male, and the majority are likely to have problems as regards their masculine adequacy and perform of overt sexuality or in terms of latent problems of sexual development fixations at earlier levels of sexual development which

are enhanced by the individual in terms of feelings of inadequacy, inferiority and wish fulfillment for status prestige and power.

Mr. Farr: Speak up just a little louder please.

Q. In your opinion, do these magazines have a dominant appeal for homosexual males?

A. Yes.

Q. These magazines have a particular appeal to the prurient interest in sexual matters for the homosexual?

A. Yes they do.

Q. Would you say that this prurient appeal dominates over other values of the magazine?

A. Yes. The prurient is the only isolatable value of the attraction for sexual lust for reactions.

Q. Would you say from your studies that the magazine had any literary value?

A. They do not.

Q. Do they have any scientific value?

A. They do not.

Q. Do they have any educational value to your knowledge?

A. They do not.

Q. Do you believe that this appeal to the pruriency goes substantially beyond customary limits of candor and expression?

A. Yes.

[fol. 42] Q. What effect if any do these magazines have upon the behavior of homosexual males in your opinion?

A. It is likely to stimulate the individual sexually and he of course will react in terms of overt behavior in accordance to his individual personality and his pathology.

Q. What specific act do you believe these magazines could evoke in homosexual males?

A. Every possible sexual disorder.

Q. Such as, Doctor.

A. Approaching another male either normal or abnormal for purposes of sexual relationships self-abuse in terms of masturbation, exhibitionism, various forms of the individual behavior, what I am saying here is that this material stimulates the instincts because such persons have inade-

quate control of their instinctual drives they are likely to react according to their defenses their ordinary way of reacting. Now sexual deviancy is a wide range of behavior.

Q. Could that take a behavior of anal genital behavior?

A. Yes every possible conceivable form.

Q. What effect if any would these magazines have upon the behavior of adolescent males specifically?

A. Well, there again the same model applies and they would react primarily with instinctual arousal, sexual arousal which would take the form of fantasies, immoral and sexual thoughts and also in the form of masturbory behavior or an increased reliance upon this type of addicted material to stimulate them better for their needs and would also lead them into contacts with other persons too so that this behavior could be good behavior or could be individual behavior but in all aspects it would be characterized as sexual behavior.

Q. Would it lead these adolescents into homosexual patterns?

A. Yes, definitely.

Q. Now, I understand, Doctor, that you have had occasion to prepare these magazines with various other cities for obscenity or pornography or as defined by other psychologists is that correct?

A. Yes.

Q. Would you please explain how these magazines compare or rate on the index that you had prepared from rating the works of others that made studies of this field?

Mr. Dietz: This is based on hearsay I assume, Your Honor, I therefore object to it.

[fol. 43] Mr. Farr: Mr. Judicial Officer, I am asking the witness at this time to rate these magazines on an index that he has prepared based upon his study of other authors and at this point to lay a foundation perhaps I had best ask him who the people or who the authors are of the original anthesis of pornography and techniques of obscenity that he would be adapting and developing his own index.

Judicial Officer: I will take the answer, let's go ahead.

A. Well, of course, this is a controversial area the difference between the art and other forms of expression and what is considered to be obscene and there are basic rules which the observer or the investigator can use in a term of what is hard core pornography or what is for example erotic realism in art and primarily the idea is that if it appeals basically or almost entirely or primarily to the prurient interest the erotic fantasies, sexual arousal of the individual and to no other major topics that is likely to be obscene.

Of course this can be broken down into various areas the intent of the publisher and the material and the content of the material itself and the organizational structure of the material and the gimmicks or techniques which are used to get across this basic pattern, to stimuli and of course the effects it has upon the individual too. And in the literature in which I have conducted research and there are at least 12 criteria which are very specific and explicit which distinguishes pornographic or obscene material from other controversial material. First of all is the intent of the material as a whole: what is the dominant theme in the material taken as a whole not just one particular part but the entire message of this appeal, does this appeal to prurient interests of the reader, the person who buys this magazine or this publication, in other words, is it gentle or is it morbid or does it appeal to the sexual arousal or to some extratory functions and is this content alone, is this primarily directed toward this activity rather than to an educational or literary entertainment or to scientific interest.

Q. Now in regard to that criteria, Doctor, how do you read these particular publications?

A. In terms of my entrances from all the data con- [fol. 44] sidered as a whole I would conclude that the intent of the publishers is to arouse prurient interest in the individual. Now this is of course the salable aspects of it. I imagine that to the primary motivation is financial, but this is the vehicle or the method used for financial gain.

Q. And the next criteria, Doctor?

A. The organizational structure of the data: now material is pornographic if the individual is constantly stim-

ulated by a series of repetitious stimuli either literary or pictorial and there is a definite focus upon the sexual aspects rather than upon any other aspects of the publication. And in this collection of evidence, there is the stereotype repetitious display, every page has a picture on it, the cover has a picture, the rear cover has a picture and even advertisements have pictures so there is a stereotype repetitious display of nudity and of the physical person. And in addition too, you find that there is this repetitious series of stimuli, there is what they call the build-up technique, it starts off slowly and by the time it gets to the middle of the book, there is a climax or it reaches its highest peak and then it settles down toward the end so that each one of these books, in each one of these books you will see there is a double page spread right in the middle so that it is a climatic or orgasimic approach to the presentation of the data. This is a basic technique of pornography. The development from the cover appeal to the central theme or the issue in the book. And every one of these publications has the same kind of format and of course the audacious or the most tabooed picture is usually the one that is the climax of the presentation for the information, so this in itself is another index of pornography. Not one index alone establishes pornography but when you take them all together you have reasonable basis for assuming the material is obscene.

Now another technique is what they call authoritative condonement where they have a quotation from authority to say that this particular material is all right for the reader. For example they have in one of these magazines the Grecian Guild Pictorial for March on pages 14, 15, and 16 they have a father-son combination where the father is initiating the son in a very permissive way to the ritual of the body culture. In another magazine of the same type [fol. 45] Grecian Guild Pictorial for March 1960 they have implied endorsement by a clergyman in England who prays for the attention of this group and who has made a statement about the body being the sanctuary of the soul. And in another addition here they have a clinical psychologist who will answer any subscriber's letters and give them personal guidance and of course this is unethical

as far as the American Psychological Association is concerned but here you have a scientist, you have a father figure and you have a religious person who implicitly condones and permits the reader to satisfy himself in this material. In other words you have a built-in guilt relieving mechanism so that the observer can go along without developing too much anxiety. And of course this is obviously a technique which is used.

Another aspect is the confusion the putting together the diffusion, the putting together of the aggressive hostile personality with the sexual aspects, for example all throughout here you have symbols of guns of swords, of man who is reaching out and symbolizing with his finger you have poles and you have all kinds of valid symbols of power and potency and you have destructive gestures with the swords and various weapons, and this is a combination a pathological combination of hostility and sexuality. And in one ad for example they had a scene where one man is on top of the other he is beating him and another man is standing by and sort of weeping into his hands over this kind of an activity, and here you get the combination of sadism, masochism with the sexual domination and humiliation of the underdog together with the observer. There always has to be an observer in this process to make it pornographic, consequently you have the physical pain, you have the moral humiliation, the extolling of the perpetrator of the act and you have humiliation of the individual underdog. You have all the symbolisms and you have the observer standing by in a very passive way observing and weeping over this activity.

Q. What is the next criteria Doctor?

A. The next criteria is the fact that the content will be substantially on a conventional customary limits of candor which I answered to before.

[fol. 46] Another criteria is the fact that there is variety in these pictures. You get all kinds of males here ranging from the most feminine in appearance to the most masculine. You have males ranging in ages from 12, 14 up until 30, 35, you have people of all nationalities, you have what they call dual-photos combinations of partners together and you have negroes symbolisms and you have

Indian symbolisms and all these symbolisms which in the ordinary culture reflects something about sexual adequacy or potency so you have a wide range of variety to appeal to any individual no matter who he is, a choice of his particular problems. The other criteria is that there is no truthful description of reality as is experienced by the individual reader. This is all that comes with an idea. A person who reads this for example a 98 pound weakling he doesn't look like this but this is a person that he wants to be, ideal, ideal and the highlighting of the focusing of the camera giving exaggeration of various parts cover the attitude of limitless potency by awaking to the barrier, the symbols, etc. These are all fantasies, these are not real except for these particular individuals and for the observer or spectator or reader. This does not constitute a purposeful presentation of the truth but ostensible distortion of the truth in order to provide erotic stimulation.

Now these are exhibitionistic. The other criteria is that whenever you have a warrior you have an exhibitionistic the people who look at these are the people who need to see and need to find out so you have one half of the card in here you have the exhibitionist, the person who buys this is the person who needs to visually experience sex so this does appeal to persons who have certain displacements of the natural sexual instinct into other activities.

The next criteria is that sexuality presented in some of these pictures is so vague and so indefinite that you don't know whether the person is a man or a woman. It is either done by highlighting or by specific selection of a model and therefore you have what is called an A sexual sexuality. You have a neuter gender which is neither masculine nor feminine and of course this appeals to the interest of the homosexual.

The other aspect is, the other criteria is that there is [fol. 47] particular emphasis upon the sexual areas of the body. Now those areas which are concerned primarily with procreation or defecation or with excretion, so by various camera techniques and various methods of cutting and nodding, etc., you do get to focus not on the whole person as an individual or as a personality but the particular body part which the individual reading it derives stimulation from.

And the next criteria is that all these persons, the models represent the monotonous personality presentation or appearance they are all infantile and their expression is rather dull and unexpressive so you have a neuter kind of emotional kind of expression which the individual can project whatever emotions he particularly feels into the picture or themselves so if you look carefully at these pictures you will see no personality within the models all you will see is some sort of a blank or lack of maturity which the observer will project into it and this satisfies certain laws of perception and behavior in psychology.

Another aspect of pornography is that the adjectives and the word pictures which go along with some of these photos are all without substance. They all describe the models in various tremendous terms but they have no particular substance to them just merely a string of adjectives which are mental stimuli to the individual. Throughout the whole book and the whole series of books in evidence there is no development of any theme or any plot or any consistent narrative, message or essay here, but just a matter of stereotype repetition of pictures so these are really picture books rather than books which contain some idea or some message.

Another aspect is that you have no direct contact with the creator or the producer of this information. You are in an art gallery looking at an artist's work you have some idea of Rembrandt's personality, what he was trying to convey to you, etc., but here you don't know who produced this all you see is the product and consequently there is no relationship between the observer and the reader of the material. This is another index of pornography.

And of course the last criteria are in terms of the effects on the individual. If this material does arouse in an ob- [fol. 48] scene way or sexually stimulate a person to carry out certain forms of behavior, then it is pornographic. So these are the criteria which are isolated in the literature of my research and are presented and adapted here for analysis of this material.

Q. One point of clarification Doctor, I noted that you stated that in these magazines there was an A sexual sexuality to some of these photographs. Could you explain a little more fully what you mean by that?

A. Well the model is either so immature in his facial expression and in his general appearance that you are not sure whether he is a boy or girl, a male or female and there is a highlighting profile shot of the dimples, breast development of the male so you are not sure what you are looking at, whether this is a male being photographed or a female and on the various techniques of trying to combine both male and female into the powerful unit of one.

Q. Would it be fair to summarize these criteria somewhat along the following lines that the dominant theme of these publications taken as a whole is one of arousing a prurient interest in the audience to whom they are addressed or directed to the homosexual?

A. Not only the dominant theme, but the only theme.

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Whereupon DR. MICHAEL MILLER, being duly sworn in by the Judicial Officer, testified as follows:

Direct examination.

By Mr. Dietz:

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Q. But at no time whatever have you exposed these people to pictures so that you could have concrete evidence on which to testify what their action might be in the viewing of such pictures, am I correct on that?

A. Specifically not with that intent, No. I mean if they brought up the subject we discussed it and analyzed it and observed their reactions but I did not specifically attempt to confront them with pictures.

Q. Well Doctor, isn't it so that—

A. Excuse me, the reason I didn't do this was that in our psychotherapy we considered it relatively unimpor-
[fol. 49] tant and I will tell you why because in the development of homosexuality, the factor of pictures have proven to be irrelevant in other words that pictures is not what creates the homosexual. What creates the homosexual is an abnormal relationship of the child to the parent and unbalance there in this relationship and emotional imbalance which has nothing to do with pictures. This is

a pipe dream that some one dreamed up there is nothing about the development of homosexuality. Homosexuality is a functional dynamic developmental process you see and it starts early in his life before the child is even aware of pictures.

Q. You mean to say that it is an acquired condition, is that it?

A. It is a functional acquired condition, Yes.

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Q. Well, as I understand the testimony you are proposing is not so much as to whether this picture or that picture would excite a homosexual rather than no pictures would excite a homosexual?

A. I wouldn't say this, I would not say that no pictures would excite a homosexual. I would say that pictures for the most part have little impact on most homosexuals and they would have impact mostly on those homosexuals who were frustrated and denied and could not obtain satisfaction and this would be kind of sublimating experience for them in the same way that pin-up girls were a sublimating experience for boys during the war, in the trenches.

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By Mr. Dietz:

Q. Now you have all the exhibits in front of you from 1 through 11, have you had opportunity prior to today to look through those magazines?

A. Yes, I have had an opportunity to look through most of them.

Q. Would you check them over to make sure that you have seen through all of them.

(Witness taking material from his leather briefcase before him, magazines of a light nature before him.)

A. There are several here I haven't seen.

Q. Well would you look through them please?

Have you looked through all the books Doctor?

A. Yes.

[fol. 50] Q. Now I ask you Doctor in your opinion whether to the average person apply contemporary community

standards to the material depicted in those books taken as a whole would appeal to the prurient interest of said average person?

A. The average person I believe would not appeal to the prurient interests in fact I don't think the average p.rson would be interested.

Q. All right, Doctor, I ask you whether to the average adult person adding on normal adult whether to the average normal adult person apply contemporary community standards the dominant theme of the material you have just looked at and the books in evidence taken as a whole would appeal to the prurient interest of the average normal adult?

A. In my opinion it would not.

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Q. Now Doctor for children at the Juvenile Clinic and in your other experience working with children as a psychiatrist is it your opinion that a child who looks at this material would or could become a homosexual?

A. Certainly not.

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Cross examination.

By Mr. Mindel:

Q. Doctor you say the average person or the average normal person would be likely to buy these magazines that Mr. Dietz has said.

A. I don't think the average normal person would be likely to buy the magazines except such persons as might be interested in physical development.

Q. Well is the last a firm statement of yours that such persons would buy those persons interested in physical development?

A. Well I believe that persons interested in body building and physical development such as might buy the Bernard McFadden Publication might show an interest in this kind of a magazine.

Q. You have concluded that this is a physical culture magazine?

A. It is primarily from what I gathered in intent a physical culture magazine.

Q. Have you had experience at physical culture and body building?

[fol. 51] A. Well I haven't gone in for it myself.

Q. Do you feel that you can recognize a physical culture magazine when you see it?

A. I had seen physical culture magazines, I had seen McFadden's publication.

Q. You say these are the same as McFaddens?

A. They are not exactly the same but they resemble McFaddens publication in many ways, in appeal to the beautiful body muscular development advice on body building.

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Q. Since you find it in this magazine you have this reaction that it is in poor taste, is that correct?

A. Well, I don't see too much point in it although there may be individuals who will like to see the physical development of the shoulders, the back and legs and so on. I mean this is a matter of individual opinion.

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Q. Assuming as we do isn't it a fact that many people, some people do buy this magazine, assuming as we do again it is a fact that some people respond to these advertisements would it be fair to say that it is likely that the persons who do buy the magazine respond to the magazine have a homosexual interest?

A. No.

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Q. Dr. Miller, you said the average normal person the average normal adult person because he has no interest in this magazine will not buy the magazine. I believe that publisher said that he sold approximately 25,000 copies of each issue and he has four different magazines so each month approximately it sells about 1,000 (sic) copies or indicates that—that indicates that he has an audience of some kind does it not?

A. It indicates that there is some audience, very often a high percentage of this publication is sold to the curious.

Q. Let us assume that a person buys this month in and month out would you say he has a special interest in it of some kind?

A. Well, it is possible, but you see the point is that if an individual interprets an object such as the human body or any aspect of the human body or any other object as [fol. 52] erotic or sexual, this is an individual reaction you see and individuals will always react just as Justice Douglas opinion of the Roth case, individuals will also act in their own individual way not take away this right of freedom and thought is attacking the essence of the first amendment according to Douglas and I think it is—but we are not only attacking constantly I think that is something basic in our constitutional rights but I think we are attacking the whole concept of the human body itself is immoral.

Q. I don't think it is proper for this witness to discuss the legal philosophy of the law.

Would you consider it extraordinary Dr. Miller that homosexuals would have a special interest in these magazines?

A. I wouldn't consider it extraordinary that some homosexuals would. But as I said by and large my experience has been that homosexuals are not particularly interested.

Q. You have no idea then what particular person is the regular buyer of this kind of a magazine?

A. Well, I am not familiar with the persons who have subscribed to the magazines if that's what you mean. I can only form an opinion.

Q. Do you have an opinion?

A. Well I would say that the youngster, the curious, some who are interested in physical development believe this to be a physical culture magazine and are interested in building the body, body building has received tremendous emphasis in our society, big muscles are important, athletics and physique is upheld very much, at unfortunately the cost of certain other values, and I would say generally youngsters with curiosities are interested in physical culture would be the primary buyers.

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Q. I just want to ask you on one picture Dr. Miller this is on page 23 of the April Issue of Manual.

Mr. Dietz: Exhibit one.
Mr. Mindel: Exhibit one.

(Doctor retrieving same.)

[fol. 53] A. Which page?

Mr. Mindel: 23.

Q. You see that picture?
A. Yes.
Q. Would you put that in the same classification as the human backside picture which you defined as poor taste?
A. No. I don't think so, I think this is a picture that—I don't see anything too unusual about it.
Q. Excuse me did you finish your answer?
A. Yes.
Q. Do you class this as a physical culture picture within the term as you were using it?
A. No, I would think of that more as a pose which a male model might make. I've seen them make similar poses in front of an art class.

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Dr. S. Gordden Link,

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Direct examination.

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By Mr. Dietz:

Q. Have you ever done any censorship work with photographs?
A. Yes. I was a member of the Zero Class of Military Intelligence. The Zero Class was the first class to be graduated in censorship by the Army before the official Number One Class for historical record.
There were, I think sixteen of us who were put on immediately. My first military assignment was as a Postal Censor attached to the New York Post Office on Military duty and in that capacity worked extensively with pictures, subsequently I became Chief of the Pictorial Intelligence

Section of G2 at the Pentagon and handled, I suppose, millions of pictures.

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Q. Dr. Link, I show you exhibits one through eleven and ask you if you are familiar with these magazines?

(Witness receiving joint exhibits 1 through 11.)

A. I am just checking for a moment. I have to check the list of the ones that I looked at but I want to make sure. Yes.

[fol. 54] Q. You are familiar with these magazines?

A. I looked through them, yes.

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Q. Doctor, I ask you sir, in your opinion whether to the average person the dominant theme of the material contained in that magazine, exhibit #1, would appeal to the prurient interest of said average person?

A. When you say "average person", then obviously the answer is no.

Q. All right, then, doctor, to the average normal adult person, would the material contained therein be the dominant theme thereof, appeal to the prurient interest?

A. So long as you say "average person" or "average adult person", the answer has to be no. This would not appeal to the prurient.

Q. Now, all right, would you look at exhibit #2, sir?

(Witness so doing.)

Q. (Continuing) I ask you sir, whether or not to the average person, the dominant theme of the material contained in exhibit #2 would appeal to the prurient interest?

A. Not to the average person. I think with respect—sir, am I permitted to enlarge on my answer or do I just say yes or no?

Mr. Dietz: By all means you can enlarge on your answer.

The Witness: So long as you say "average person" or "average adult" with respect to any of these pictures, the answer has to be no, that there would be no appeal to the prurient. I regard myself as an average person and my

only interest in these pictures is to compare them with the pictures I used to collect when I was in my teens and interested in in body building.

I have a feeling that even now, in my advanced age, I reflect the benefits of having collected Bernar McFadden and having taken the Earl Lederman course when I was in my teens and my first reaction was that these pictures are just about the same kind of pictures that I used to have at Earl Lederman, except that I think that Earl Lederman had a somewhat better specialized physique than some of the young men here.

Q. All right then, I ask you, sir, as to the remaining [fol. 55] exhibits three through eleven. I ask you whether to the average person the dominant theme of the material contained in each one of these magazines would appeal to the prurient interest?

A. With respect to all of these if there is any appeal to the prurient interest then the person concerned is not an average person.

Q. All right. Now, would you take exhibit #1, please sir, April 1960 issue of Manual magazine, and open to the first page, sir. Now, on the first and second pages are photographs of a young male wearing what would be called a posing strap or which has been referred to by Dr. Caprio as a "G" string. In your opinion sir, would these pictures —and please look at them carefully—would these pictures appeal to the prurient interests of the average person?

A. Well, I think we have covered that. Speaking for average people, I should say that I know there is no reason why this should appeal to the prurient.

Now, people might object to one aspect or another of these pictures, but certainly they could not be on the grounds on the effect on them personally or on their prurient interests.

Q. Does the depiction of pubic hairs in any way in these two photographs on pages one and two, affect your opinion?

A. No. Speaking for average male people, if this were a picture of a female model, there might be a different kind of reaction. I don't know, but with respect to average adults there is no reason why a peripheral pubic hair revelation should incite anything.

Mr. Mindel: What page is that, I'm sorry?

Mr. Dietz: One and two.

The Witness: First opening page.

Mr. Dietz: Excuse me, that is two and three, Your Honor. May I correct that? The numbered pages are two and three, it is the first page in the book.

Q. All right, Doctor, would you turn to page 12, please?

(Doctor turning to page 12.)

A. Yes.

Q. Now, in the lower left hand corner there is a picture [fol. 56] of a young male in a seated position?

A. Yes?

Q. In your opinion would that picture appeal to the prurient interests of the average person?

A. Not the average person, no.

Q. Would you turn to page 18?

A. Yes, I have it.

Q. Now, the photographs depicted on pages 18 and 19, would they appeal to the prurient interest of the average person?

A. No. It might appeal to the critical impulse because that is a very peculiar expression the man has on his face, but I don't think you are interested in his face.

Q. Now, on page 20, directing your attention particularly sir, to the posing strap or "G" string, that this young male is wearing, would that appeal to the prurient interests of the average person?

A. No.

Q. Now, on page 22 and page 23,—first page 22, would that appeal to the prurient interests of the average person?

A. No. I should think that my previous answers would have covered all of the pictures on the assumption that I had looked through these.

Q. All right, doctor, the picture on page 23, wherein the man is wearing Texas boots?

A. Yes?

Q. Would that appeal to the prurient interests of the average person?

A. You mean because of the boots?

Q. Because of the boots fetishism?

A. Well, there you have brought up an interesting point. This whole business of fetishism is particularly important and it does open up a whole new line of discussion, I should say.

I brought some magazines here which may have not been exposed to people here, McCall's.

Q. What issue?

A. And Ladies' Home Journal. I've got the April 1960 issue of McCall's and I am sure this magazine has never been investigated.

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Mr. Dietz: In the April, 1960 issue of McCall's—

The Witness: May I correct that to March, 1960 of McCall's?

By Mr. Dietz:

Q. That issue which you are holding in your hand, are there any other examples of fetishism?

A. Well, here now, is an example of a picture that could [fol. 57] have a very bad effect on some segments of the population because there are people who are victims of what is known as "foot fetishism". Fetishists hate being connected with sex, of course from time immemorial, I suppose. Graft and Padosky have done some rather interesting notes on them. There are men who will take this kind of picture home and will be so excited by the fact that these are female shoes in connection with feet that presumably they were on, that this will set in operation all sorts of curious sexual behavior patterns.

Now, you can—can't undertake I think to try to prevent the vulnerable people in the population from exposure to the kind of things to which they are especially vulnerable. I should not for a moment think of suggesting that McCall's be investigated because they have catered unknowingly I am sure, to the foot fetishes.

Q. All right now, going back to exhibit #1, the center fold of the book, I believe it is the next page.

(Witness finding page in exhibit #1.)

A. Yes?

Q. And what is your opinion as to that photograph?

A. Well, so long as you stick to your frame of reference, the average adult, I can't see how that would appeal to any prurient impulse.

Q. Now, Doctor, in your opinion does that photograph depict good body building, poor body building, muscular structure?

A. Well, it is a particularly good trapezius and a fairly good back, he has got a good trim pelvic girdle, evidently, come from weight lifting. Can't tell too much about his legs, they seem rather large but his shoulders and back and his upper arm muscles are particularly good especially in the right arm, the trapezius area.

Except that I am not qualified you know to appear as a witness on physical aspects except that I am not weight lifting and physical exercise myself.

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Mr. Dietz: Now, doctor, would you turn to page #35, sir. This is a photograph of a young man with a "V-shaped" garment.

[fol. 58] The Witness: Yes.

Q. Would that photograph appeal to the prurient interest of the average person?

A. No, sir; certainly not the average person.

Q. Would you turn to page #39, sir?

(Witness turning to page #39.)

Q. (Continuing) And now the picture in the lower left corner, underneath the arrow, does that depict to you, sir, a photograph of a male or a female?

A. Well, I don't understand the question. This is obviously a young man.

Q. That is the answer, Your Honor.

A. Also speaking nonmedically, you know.

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Q. Now, doctor, would viewing books of this nature or photographs—when I say "books of this nature", I am referring to exhibits #1 through #11, that are before you, would viewing books of this nature turn a young man into

becoming a homosexual if he was not predisposed to becoming a homosexual?

A. Well, the way you phrase that question there is no way I could possibly answer it except by saying no. Just exposure to pictures or literature or lectures will certainly not change the entire sexual orientation of the individual concerned.

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Cross examination.

By Mr. Mindel:

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Q. Now, Dr. Link, in view of your statements, is it likely, [fol. 59] do you think that the so-called average normal adult would buy these magazines?

A. Well, as I pointed out, I used to buy magazines of the physical culture variety because I was interested in body building. I have seen some pictures here that could have a particularly good effect on a man that was trying to do body building. Now, I am not qualified as an expert on art so I can't say that men who are artists would buy magazines like this for art purposes although I have been told that it is so.

All I can say is that from my own experience I used to collect Bernar McFadden—I don't know if anybody remembers him, and other physical culture magazines and they were very similar to these as I recall them.

Q. I'm not sure you quite answered my question. Perhaps you have as to whether in view of your previous testimony you would say that it is likely that the average normal adult person would buy this magazine?

A. Well, the average adult person is not a body builder, but those among the average adult population who are interested in physical development could very well buy them. I would assume that.

Q. You say "very well", what does that mean?

A. It just means what I say. I am not qualified as an expert to say what the general public will do. I'm not familiar with marketing or purchasing practices. You

asked me a matter of opinion. My opinion is a form of body builder that somebody who is still interested in musculature is that there are some people in the average population who would read these magazines and buy them merely because of the models involved.

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Direct examination.

By Mr. Mindel:

Q. State your whole name.

A. Harry J. Simon, S-i-m-o-n.

Q. And what position do you hold, Mr. Simon?

A. Postal Inspector.

Q. You are stationed in Washington, are you not?

A. I am.

Q. What generally is the scope of your duties as an Inspector.

A. Investigation of the use of the mails by suspected dealers in obscene matters.

[fol. 60] Q. During investigations, have you had occasion to talk with Dr. Womack, the operator and publishers of the various magazines involved here?

A. I have.

Q. Can you tell us what (sic) you first met with Dr. Womack?

A. I believe it was about March, 1959.

Q. And did he come to your office for any purpose?

A. My first contact with him was by telephone and he later came to my office about that time.

Q. At that meeting, Inspector, did you discuss with him any of the magazines in issue here?

A. There was a discussion about the magazine entitled, Trim.

Q. Can you tell us whether, during that discussion, there was any reference to the advertising in the magazine?

A. There was.

Q. Can you relate the extent of that discussion? As to the advertising?

A. To the best of my recollection, Mr. Womack's attention was called to the fact that the number of advertisers

or some of the advertisers in Trim had been involved in criminal actions, for using the mails in connection with obscene matter. And he was informed by mailing out such publications, he is possibly violating Section 1461 of Title 18, in giving information where obscene matter may be obtained.

Q. Did you have another meeting with Mr. Womack subsequent to the one that you just referred to?

A. I did.

Q. And at the second meeting, was there a discussion of any of the three magazines involved in this case?

A. Yes.

Q. Did that discussion involve reference to the type of persons who would read the magazine?

A. Yes.

Q. Can you state on the record to what extent the reference in that discussion was with Mr. Womack?

A. That discussion took place in your office during April of 1959, at which time Mr. Womack took a call with respect to the magazine entitled, Fizeek, and I sat in on that conversation. At that time, Mr. Womack did make the remark that magazines of this type were purchased by homosexuals.

Q. And in referring to this type, did he specifically make [fol. 61] reference to his own magazine?

A. Fizeek, he was talking about specifically.

Q. Did you have still another meeting with Mr. Womack?

A. I did.

Q. Was there any other Inspector present at that meeting?

A. Yes, sir.

Q. Can you state who that was?

A. That was Postal Inspector Boyd Fielder.

Q. What was the prime purpose of that meeting, can you state?

A. That meeting which took place on July 31, 1959, was for the purpose of fixing responsibility for the operation of a mail order business known as Continental Artists, and also responsibility for a separate promotion known as International Art Institute, which was being operated at Franklin Station, Washington, D. C. Post Office.

Q. And did you establish who the operator or operators of these businesses are?

A. I did.

Q. Will you state who?

A. According to Mr. Womack, he was the sole owner and operator of Continental Artists, which was responsible for the entire operation; with respect to International Art Institute, he informed me that the owner was a Mr. C. W. R. Benson of Tucson, Arizona, who was the publisher, or owner, rather, of a publication known as Grecian Guild Pictorial. Mr. Womack was printing this publication for Benson. Mr. Womack further mentioned the Post Office box—the box was mentioned and Mr. Womack picked up the mail addressed to that firm and forwarded it intact to Benson in Tucson.

Q. That is for Grecian Guild Pictorial?

A. No, International Art Institute.

Q. You say that Grecian Guild Pictorial at that time was owned by Benson, is that correct?

A. Yes, sir.

Q. And you discussed with Mr. Womack at that time, the ownership of Trim Magazine? Did he state from whom he had purchased that?

A. Yes, at that time, he indicated that he had purchased Trim sometime previously from Benson.

Q. What was your purpose in attempting to establish ownership of Continental Artists?

[fol. 62] Mr. Dietz: Your Honor, this question and anything relating to Continental Artists has absolutely nothing to do with the hearing before Your Honor. Now, it is not going to hurt us for him to testify in that regard, but it is going to make the record so much larger with just surplus matters. I object to the question, therefore.

Judicial Officer: I think I can see the purpose, however, because isn't it : fact that this magazine, that he is talking about, one of these ads appears.

Mr. Dietz: Continental Artists? No, Continental Artists are in no magazines.

Judicial Officer: Well, I thought that the—oh, that's the one that Mr. Womack owns, and the magazines contain an ad as to where these may be obtained, is that it?

Mr. Mindel: Let me clarify on it.

Mr. Dietz: No magazine contains an ad where Continental Artists can be contacted.

Judicial Officer: Let me hear from Mr. Mindel.

Mr. Mindel: Continental Artists is a separate business operated by Mr. Womack. Mr. Womack is also President of the corporation which published the four magazines before you. Continental Artists is the name under which he mailed certain articles which were the subject of this recent conviction under 1461. We would hope to get in some evidence of the type of material he was selling under that name. Our position, of course, on this whole matter before you is that these magazines are sold to homosexuals and knowingly designed and sold to homosexuals by Womack, and the type of material sold in Continental, we should want to show is along the same lines so as to establish further the awareness of this publisher as to the type of clientele he was catering to.

Mr. Dietz: Based upon Mr. Mindel's statement, I would therefore affirmatively object to any information regarding Continental Artists. I don't think that it is in any way relevant. He states himself that it was an entirely separate business subject to a separate court action in the United States District Court for the District of Columbia, and has nothing to do with the matters before Your Honor. [fol. 63] Judicial Officer: I think I will take the answer. Overrule the objection.

By Mr. Mindel:

Q. I believe the last question, Mr. Simon, what was your purpose in attempting to establish responsibility or ownership with Continental Artists.

A. My purpose in talking to Mr. Womack about Continental Artists and International Art Institute was preparatory to presenting the matter to the United States Attorney for consideration of criminal action.

Q. Did you caution Mr. Womack with respect to his rights in the matter, to give you that information, in the light of that last statement of yours?

A. He was fully advised of his constitutional rights before I proceeded with the questions.

Q. Did Mr. Womack make any statement to you during this third interview with respect to the readership of the magazines, Trim, Grecian Guild Pictorial, Fizeek?

A. He did. I don't know whether reference was made to specific magazines, but it was related to publications of that type, particularly those that were discussed with him at that time.

• • • • • • •

Q. And was it thereafter that he made the general comment that you made reference to?

A. Yes.

Q. And can you state what that comment was?

A. He was substantially—it was substantially to the effect that, as adults we don't have to kid each other, we know who is getting these magazines and pictures of the type that he was then selling under the name of Continental Artists.

Q. Did he say that he knew who would be buying it?

A. Yes.

Q. And did he say who they would be?

A. Homosexuals.

• • • • • • •

By Mr. Mindel:

Q. Can you state what the practice is of the type of dealer that I have just referred to in selling obscene pictures through the mail?

A. Yes.

Q. Will you describe it?

A. Well, I frequently found it to be the case where it is necessary to make a number of purchases before you obtain what you might call extremely pornographic material or [fol. 64] hard core pornography. They sometimes send you borderline material in the earlier purchases, but if you continue to purchase from some of these dealers, you are successful in obtaining the hard core pictures.

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Cross examination.

By Mr. Dietz:

Q. Now, Mr. Simon, when did you first have the conversation with Dr. Womack regarding the advertisers, as you put it, listed in the directory of any of those magazines?

A. To the best of my recollection, it took place during March of 1959.

Q. All right, now, Mr. Simon, is it not a fact that Dr. Womack told you at that time or at any other time, that you had discussed advertisers listed in the directory of his magazines, that he would drop any advertiser or any listing in his directory upon your informing him that the person named had been convicted?

A. He did.

Q. All right, now, pursuant to that, did you notify Dr. Womack that one person named James Hill had been finally convicted and was a person listed in his directory?

A. I did.

Q. And is it not a fact that thereafter, the name of James Hill was deleted from the directory of contributors to the magazines in question.

A. I recall that that name remained in the magazine for some time after my first discussion with Mr. Womack in calling his attention to the fact that Hill had been convicted, although several of the other names of people I have mentioned have been deleted.

Q. All right. Do you know when you told Dr. Womack about James Hill? I mean, about his being convicted, of course?

A. I don't recall whether it was in the March conference with him or whether it was in July.

Q. And did Dr. Womack ever tell you that the name of James Hill might have been already printed in some magazines so that it could not be immediately deleted, but would be deleted upon the next time the magazine was made up and the printing was set up?

A. He might have, but I don't recall.

[fol. 65] Q. Has Dr. Womack ever refused to take, to delete, from his directory the name or names of anyone that you have informed him was finally convicted?

A. Will you repeat that question please?

Q. I say, has Dr. Womack ever refused to delete from his directory the names of any photographer or contributor to his magazines after your having told Dr. Womack that the contributor or photographer had been finally convicted?

A. No.

Q. Now, you testified, Inspector Simon, regarding a third interview with Dr. Womack, where a reference was made by Dr. Womack to Fizeek magazines in general. I ask you, sir, at that time, did Dr. Womack not tell you, sir, that you were both adults, there was no sense fooling, fooling each other, that he knew that homosexuals could be buying this type of magazine, meaning physique magazines in general field?

A. Yes.

Q. Now, the exhibit that we have regarding magazines, photographing physiques, which is Exhibit C, Your Honor, by Tony of Vulcan Studio, to your personal knowledge, sir, was this magazine not distributed by Continental Artists and not by Tony of Vulcan Studios in New York?

• • • • • • •

A. That was offered for sale by Continental Artists.

Q. And not by Tony of Vulcan Studios in New York?

A. To the best of my knowledge, it was not.

Q. And have you ever found a list of Continental Artists in any of the magazines in question here?

A. No.

Q. All right. Now, in Exhibit 2, Mr. Simon, would you please turn to the directory in the rear, which is on page 45—44, excuse me.

A. I have it.

Q. All right, do you find a listing in the magazine for Vulcan?

A. I do not.

Q. Now, in Exhibit 4, –by the way, that Exhibit 2, what month is that?

A. May 1960.

Q. And this Exhibit 4, which is March 1960 issue, do you find on the directory, a listing for Vulcan?

A. I do.

[fol. 66] Q. And is it not a fact, sir, that in about January of 1960, this party known as Tony, Tony Guither, do you know him by that name?

A. I've heard of him.

Q. Tony Guither closed down his photography studios in New York?

A. I have heard that he went out of business.

Q. So actually he was out of business when these magazines went on sale, the March and May issues of Trim, is that correct?

* * * * * * *

Q. From anyone listed in that directory?

A. I have.

Q. And from whom was that?

A. Oh, I have purchased from several different dealers during the past year. I recall—recall specifically James Hill's. There was a man named Woods in California, that I had ordered from directly, from Trim or one of these other publications of Mr. Womack's, M. C. Woods is the name in Glendale, California. I don't recall any others at this time.

Q. Mr. Simon, is it not a fact, sir, that Dr. Womack, dropped the name of M. C. Woods from his directory, to your knowledge, sir?

A. I don't believe it appears in this later issue, the May issue, but it does in the March issue.

Q. Had you ever told Dr. Womack to delete the name of M. C. Woods?

A. I did not because I was not aware of any criminal action against Mr. Woods.

Q. But at any rate, it was deleted on Dr. Womack's own motion, was it not?

A. It was deleted from the May catalogue.

Q. All right. Now, do you know a gentleman named Rodney Crowther, who was a photographer?

A. I do.

Q. And is it not a fact that Dr. Womack, to your knowledge, deleted Rodney Crowther's name as a contributing photographer from his directory?

A. I know that he has.

Q. How about a photographer who trades under the name of Quirk?

A. I don't believe I mentioned that name to Mr. Womack.

Q. But do you know that photographer?

A. I know about him.

Q. And is it not a fact that Dr. Womack, on his own motion, deleted that name, that photographer, from his directory?

[fol. 67] A. I see the ad in the March 1960 issue, but I don't believe it appears in the May issue.

Q. All right. And how about a photographer who trades under the name of Minor?

A. That appears in the March directory, but I never discussed that name with Mr. Womack.

Q. But at any rate, that was deleted, was it not, from his directories?

A. I haven't examined the two sufficiently, but I don't believe it is in the May issue. I don't see it in the directory.

Q. Now, is it not a fact, at least with the party, Crowther, that Dr. Womack informed you that he had—when I say "he", Dr. Womack had conducted exactly the same procedure that you followed, and sent out a test letter to obtain the type of material that Crowther was sending out, and therefore he was deleting Crowther's name from the mailing directories, is that correct?

A. I don't recall that that was the reason for deleting the name, but he did mention that he had obtained pictures from Crowther to purchase, and that he was using the mails for the purpose of distributing pictures of male nudes.

Q. And is it not a fact that Dr. Womack then deleted Crowther's name from the directory, to your knowledge?

A. It was deleted in subsequent issues of publication, but I don't remember with what issue.

Q. I show you Exhibit 1, MANual, pictures of Bugs Geel, which are on pages 26 and 27.

A. Yes.

Q. These are in evidence, Your Honor. These are the photographs that were referred to before. Those photographs have the heading DeZign on it, is that correct?

A. Yes, sir.

Q. And that, as you say, is Frank Collier ads.

A. Yes.

Q. Has Frank Collier ever been finally convicted?

A. On a local charge, but not on a federal charge. It is still pending. He is under indictment, both in Norfolk and the District of Columbia.

Q. Now, the federal charge would encompass sending things through the mail. The local charge would be, as I understand it, of having materials available for sale. Is that correct?

A. Possession and sale.

* * * * * * *

Q. This gentleman, Tony Guither in New York, to your [fol. 68] knowledge, sir, has he ever been convicted of sending anything through the mails or possession of obscene materials?

A. I am not aware of it. I have no information to that effect.

* * * * * * *

Q. Now, Inspector Simon, is it not a fact that since the first visit you have had with Dr. Womack, whether in your office or his office or any telephone conversation, Dr. Womack has always indicated to you that he knew that you were receiving copies of everything that he sent through the mails?

A. He said that.

* * * * * * *

Q. And is it not a fact, sir, that on many of the occasions which you have had opportunity to speak to Dr. Womack, that he has told you at any time you tell him that what he is sending through the mails is obscene, he will discontinue that business?

A. He mentioned that to me on at least two occasions.

Q. Have you ever informed Dr. Womack that in your opinion, as a Postal Inspector, any of his materials were obscene?

A. I told him I could not inform him along those lines.

Q. So that you have never told him that in your opinion, as a Post Office Inspector, what he is sending through the mails is obscene material?

A. That is right. I told him it was not my function to advise him what is or what is not obscene.

Mr. Dietz: That's all I have, Your Honor.

* * * * * * *

RICHARD S. FARR

* * * * * * *

Cross examination.

By Mr. Dietz:

* * * * * * *

Q. All right. Now, did Dr. Womack, during that conversation, state that he had no way of knowing how many homosexuals purchased these magazines?

A. I don't recall anything along that line specifically.

Q. Did he not state that these magazines were sold pri- [fol. 69] marily at newsstands?

A. Yes, he did.

Q. —and that he had no way of knowing or checking as to who purchased these magazines from the newsstands?

A. Yes, that's true.

* * * * * * *

SAUL S. MINDEL having first been sworn by the Official Officer, took the stand and testified as follows:

Examination by Mr. Farr:

Q. Please state your name?

A. My name is Saul S. Mindel, and I am chief of the Mailability Section of the Post Office Department.

Q. Mr. Mindel, you have subscribed and sworn to a statement which has been tended to this hearing this afternoon?

A. Yes, I have.

Q. Did you testify that this statement is in all respects true and represents your present recollection of the occurrences in the events set forth in this affidavit?

A. It does.

Mr. Dietz: Cross examination.

Cross examination.

By Mr. Dietz:

Q. Mr. Mindel, referring to the first page of your statement, the paragraph that the mailer stated he felt probably that about 50 percent of the readers are homosexual males and 50 percent are interested in physical culture, at that time, did Dr. Womack inform you that he had no way of knowing just who purchases these magazines, because they were sold through newsstands?

A. I don't recall that specific statement, but I do recall clearly, "Well, let's not kid ourselves, we know who is buying this magazine, and that is homosexuals," when I made the suggestion that it was homosexuals that were buying it. That's what I recall.

• • • • • • •

Mr. Dietz: Your Honor, I ask for a ruling.

A. No, I did not, because there was no occasion for it.

Q. Did you advise him that anything he said might be used against him in any future hearing, regarding his magazines?

[fol. 70] A. Mr. Womack sought me out to make certain statements and that was one of them.

Q. Sir, you didn't answer my question. Did you advise him?

A. I told you I did not.

Q. Is it not a fact, Mr. Mindel, that at any time you have discussed these magazines and their possible audience, the purchasers of these magazines, you have always insisted to Dr. Womack that these magazines were purchased by homosexuals chiefly?

A. You say at any time I have spoken with Mr. Womack —on two occasions only. The two referred to are in this affidavit. In this first one, I made the suggestion to him that this was probably the audience, and frankly, he picked up the suggestion with such alacrity that I was astonished that he made such a clear admission of the type of audience that this was going to.

Q. How about at the second meeting?

A. You were present at the second meeting, and you recall, as Mr. Farr has just testified, how we led up to that point and at first Dr. Womack resisted the idea and denied that he had said that at the first meeting, but finally he did agree that he did say it at the first meeting and that was a fact.

Q. Do you have your shorthand notes on that second meeting?

A. My shorthand notes are very sketchy on that second meeting.

(Receiving yellow papers.)

Q. You never had them typed up, sir?

A. It is my practice, Mr. Dietz, to make notes like these and keep them in untranscribed form until there is some occasion, but this particular occasion, as you can see, there is only one page in issue. You recall we were there a couple of hours, so obviously this is very sketchy.

Q. Do you have any shorthand notes as to what Dr. Womack said, his actual words, which you have paraphrased and concluded as, "he agreed"?

A. I am reading these over. I don't see anything in these notes on that point.

Q. Did you read those shorthand notes over before you dictated this affidavit which you have subscribed, which we are considering here?

A. Yes, but as to this part of it, of course, I was depending on my own recollections, because this was actually an outstanding part of the meeting when you and Mr. Womack were present with Mr. Farr and myself.

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[fol. 71]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1450—'60

1. MANUAL ENTERPRISES, INC., a body corporate, 2. TRIM ENTERPRISES, INC., a body corporate, 3. GRECIAN GUILD, a body corporate, 1318—14th Street, N.W., Washington, D. C., Plaintiffs,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States Post Office, Washington, D. C., Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF—Filed May 13, 1960

Plaintiffs, by their attorney, Stanley M. Dietz, complain of the defendant as follows:

1. The amount in controversy exceeds $3,000.00, excluding interest and costs, and is within the general equity jurisdiction of this Court and Rule 65 of the Federal Rules of Civil Procedure.

2. Plaintiff, Manual Enterprises, Inc. is a District of Columbia corporation, organized and existing under the laws of the District of Columbia, and is engaged in the business of publishing a monthly magazine named "Manual," with a monthly distribution in of 25,000 issues, of which approximately 12,000 issues are circulated through the United States mail. "Manual" magazine sells for 50¢ per copy.

3. Trim Enterprises, Inc. is a District of Columbia corporation, organized and existing under the laws of the District of Columbia, and is engaged in the business of publishing a bi-monthly magazine named "Trim", with a bi-monthly distribution of 25,000 issues, of which approximately 12,000 issues are circulated through the United States mails. "Trim" sells for 50¢ per copy.

[fol. 72] 4. Grecian Guild is a District of Columbia corporation, organized and existing under the laws of the District of Columbia, and is engaged in the business of publishing a bi-monthly magazine named "Grecian Guild Pictorial," with a bi-monthly distribution of 25,000 issues, of which approximately 12,000 issues are circulated through the United States mails. "Grecian Guild Pictorial" sells for 50¢ a copy.

5. The April issue of "Manual" is now in transit in the United States mail. The May issue of the magazine "Trim" is now in transit in the United States mail, and the next issue of said magazine for July, 1960 will be placed in the United States mail in May of 1960. The May issue of the magazine "Grecian Guild Pictorial" is now in transit in the United States mail, and the bi-monthly issue for July, 1960 will be placed in transit in the United States mail during the month of May, 1960.

6. The defendant, Arthur E. Summerfield and his Post Office Department officers, agents, servants, employees and attorneys have in the past harassed the plaintiffs by withholding from transit in the mail the plaintiffs' magazines, declaring same to be obscene under the terms of 18 U.S. Code 1461 (Postal Manual 124.31) and have threatened in the future to withhold from the mails plaintiffs' magazines. The March and April issues of "Manual" magazine have unjustly and inequitably been withheld from the mails. The March and May issues of "Grecian Guild Pictorial" have been so unjustly and inequitably withheld from the mails. Upon receiving notice of the withholding from dispatching in the mails, the plaintiffs have the alternative to withdraw said issues from the Postal Department, then trucking same by interstate carriers, or appealing the action of the Post Office Department through administrative procedures. The costs of transporting the withheld issues by interstate truckers is prohibitive to the plaintiffs.

7. On April 21, 22, and 25, the plaintiffs attended administrative hearings in the Postal Department before the judicial officer of the Post Office Department, in which numerous exhibits were presented and testimony of both

lay and expert witnesses was taken. The preponderance of the expert testimony showed that the magazines in question would not appeal to the prurient interest of the average normal person in the community, but that said maga- [fol. 73] zines would appeal to the prurient interest of the homosexuals. The preponderance of the lay testimony showed that some four advertisers in the magazines, out of approximately sixty advertisers and contributors to the magazines would after numerous and persistent requests, deliver and sell photographs of male nudes to a purchaser. The lay testimony further showed that the plaintiffs had no knowledge of what said four advertisers were selling and that the plaintiffs, upon being informed that *any* of its advertisers or contributors had been convicted did delete from its magazines the works of said advertiser or contributor. Thereafter, on April 28, 1960, the Chief Judicial Officer of the Post Office Department entered a finding that the magazines of the plaintiffs were non-mailable under Title 18 U.S.C. 1461, as being obscene and as giving information as to where, how, and from whom obscene materials may be obtained, which said finding of the Judicial Officer is contrary to the law of the United States as interpreted by the Supreme Court of the United States in numerous cases.

The defendant's unlawful and inequitable actions aforesaid in withholding from the mails the plaintiffs' magazines are subjecting the plaintiffs to continuing and irreparable injury, which actions of the defendant should be immediately restricted and enjoined; failure to immediately restrict and enjoin the defendant will subject the plaintiffs to further irreparable injury and continuing deprivation of their means of livelihood. All of the defendant's actions are calculated by the defendant to censor and harass plaintiffs and are a prior restraint designed to deprive the plaintiffs of their rights under the First Amendment of the Constitution of the United States of America.

8. Copies of the plaintiffs' magazines are attached hereto as exhibits and included by reference herein to support the plaintiffs' allegations that said magazines are not obscene under the provisions of Title 18 U.S. Code 1461 (Postal Manual 124.31).

9. No injury could result to the defendant or to the public through this Court's immediate restraining and enjoining the defendant's unlawful and inequitable actions aforesaid.

[fol. 74] Wherefore, the premises considered, plaintiffs pray the Court for the following relief:

1. That defendant be restrained and enjoined pendente lite and permanently from withholding from dispatch through the mails of the plaintiffs' magazines pending the final decisions of the courts of competent jurisdiction.

2. That plaintiffs have such other and further relief as to the Court is just and reasonable.

Stanley M. Dietz, Attorney for Plaintiffs, Manual Enterprises, Inc., Trim Enterprises, Inc., Grecian Guild, 1406 G Street, N. W., Washington, D. C.

Duly sworn to by Herman L. Womack, jurat omitted in printing.

In United States District Court

Motion for Preliminary Injunction—Filed May 13, 1960

Now Comes the plaintiffs, by their attorney, Stanley M. Dietz, and moves the Court for an Order granting a Preliminary Writ of Injunction against the defendant, Arthur E. Summerfield, Postmaster General of the United States, his officers, agents, servants, employees and attorneys from withholding from dispatching through the mails of plaintiffs' magazines "Manual", "Trim," and "Grecian [fol. 75] Guild Pictorial", pending this suit and until further Order of the Court upon the grounds and in accordance with the prayers as set forth in the Complaint filed herein, namely that the defendant's unlawful and inequitable actions in withholding from dispatching through the mail of plaintiffs' magazines based upon the finding of April 28, 1960 by the Post Office Department Judicial Officer that said magazines are non-mailable under Title 18 U.S.C. 1461 are causing plaintiffs to suffer immediate and irreparable injury, loss and damage.

Defendant and the Public will suffer no prejudice or injury by the granting of this Motion.

Stanley M. Dietz, Attorney for Plaintiffs

NOTICE

To Arthur E. Summerfield
Postmaster General of the United States Post Office,
Washington, D.C.

Please take notice that the Rules of this Court require that if you oppose the granting of this Motion, you, or your counsel, shall within five (5) days from the date of said service of a copy of the attached Motion upon you, or such further time as the Court may grant, or as the parties to this suit may agree upon, file in reply with the Clerk of this Court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for the plaintiffs.

Stanley M. Dietz, Attorney for Plaintiffs

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

1. *Roth* v. *United States*, 354 U.S. 476, at page 489, Justice Brennan. The test of obscenity: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" page 502. At page 489, "The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well emcompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." At page 502, Justice Har-
[fol. 76] lan, "I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader."

2. *Sunshine Book* v. *Summerfield*, 128 Fed. Supp. 564, 101 U.S. App. D.C. 358; 249 F. (2d) 114; 355 U.S. 372.

3. *Sunshine Book* v. *Summerfield*, 95 U.S. App. D.C. 169, 221 F. (2d) 42.

4. *One, Inc.* v. *Oleson*, 241 F. (2d) 772; 355 U.S. 371.

5. *Smith* v. *California*, 28 L.W. 4033.

AFFIDAVIT OF HERMAN L. WOMACK IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION—Filed May 13, 1960

District of Columbia) ss.:

Herman L. Womack, upon his oath being first duly sworn according to law, deposes and says that he is President of Manual Enterprises, Inc., President of Trim Enterprises, Inc., President of Grecian Guild, that of the monthly distribution of "Manual Magazine" of approximately 25,000 copies, approximately 755 are mailed directly to subscribers, the balance are sold through the mails to newsdealers; that of the monthly distribution of "Trim Magazine" of approximately 25,000 copies, approximately 825 are mailed directly to subscribers, the balance are sold through the mails to newsdealers; that of the monthly distribution of "Grecian Guild Pictorial Magazine" of approximately 25,000 copies, approximately 785 are mailed directly to subscribers, the balance are sold through the mails to newsdealers. That the affiant has no way of knowing the nature of the purchasers of his magazines, does not now and never has known whether the purchasers of plaintiffs' magazines are or are not homosexuals and the affiant verily believes it would be impossible to ascertain whether or not the readers of plaintiffs' magazines are homosexuals.

Herman L. Womack

[Jurat this 12th day of May 1960]

[fol. 77]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT—Filed May 19, 1960

Defendant by and through his attorney, the United States Attorney, moves this Court for summary judgment in his behalf upon grounds that there exists no genuine issue as

to material fact and defendant is entitled to judgment as a matter of law. In support of this motion there is filed herewith and incorporated herein by reference the record of proceedings conducted by the Post Office Department which consists of:

1. The administrative file certified by the General Counsel Post Office Department and marked as Government's Exhibit A;

2. Joint exhibits 1 through 11 and Post Office Exhibits A through T, marked as Government's Exhibit B;

3. Transcript of hearing before Post Office Department's Judicial Officer, pages 1 through 408, marked as Government's Exhibit C.

STATEMENT OF MATERIAL FACTS UNDER LOCAL CIVIL RULE 9(1)

The statement of material facts as to which the moving party contends there is no genuine issue as required by Local Civil Rule 9(1) is the entire record of the administrative proceedings attached to this motion and made a part of it. The statement of facts set out in defendant's memorandum of points and authorities accompanying this motion is not intended to fulfill the requirements of the aforementioned rule but is only meant to be a summary of facts extracted from the record.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, Robert J. Asman, Assistant United States Attorney.

Of Counsel, Saul J. Mindel, Esq., Post Office Department.

[Certificate of Service.]

[fol. 78]

In United States District Court

Answer to Motion for Summary Judgment— Filed May 24, 1960

Now come the plaintiffs by and through their attorney and answers the motion for summary judgment herein as follows:

1. The basis of the Post Office Judicial Officer's decision in brief is that the magazines in question would appeal to the prurient interest of a homosexual reader and would not appeal to the prurient interest of the average, normal adult member of the community and therefore, are obscene, is in conflict with the decision of the United States Supreme Court in the case of *Roth* v. *United States*, and therefore should not be allowed to stand by this Court.

2. The expert witnesses who testified at the Post Office Department hearing all stated that they were not experts in the field of body building and weight lifting and physical culture and therefore their testimony must be limited by their own qualifications in that regard as they could not testify as to what interest persons other than homosexuals might have in the magazines in question.

3. The affidavit submitted in support of the motion for preliminary injunction herein clearly shows that no one is capable of stating who the purchasers of these magazines are, since they are mostly sold through newsstands to the general public.

4. Even if these magazines were purchased only by homosexuals they would fall under the protection of the First Amendment of the Constitution of the United States of America as set forth by the Supreme Court of the United States in the case of *One, Inc.* v. *Oleson*.

5. The finding of the Judicial Officer of the Post Office Department that the magazines contained advertisements as to where, how, or from whom obscene material may be obtained is erroneous, since the publishers of these maga-

zines cannot be charged with knowledge of any type as to the nature of the materials sold by the advertisers under the ruling of the Supreme Court in *Smith* v. *California*.

Wherefore, plaintiffs assert to the Court that defendant's [fol. 79] motion for summary judgment should be denied and plaintiffs' motion for temporary injunction should be granted as prayed therein.

Stanley M. Dietz, Attorney for Plaintiffs

[Certificate of Service.]

In United States District Court

Plaintiffs' Motion for Summary Judgment—
Filed June 8, 1960

Now come the plaintiffs, by and through their attorney, and move this Court for summary judgment herein.

Plaintiffs herein are publishers of magazines, copies of which are attached to the complaint herein, which plaintiffs pray the Court to include by reference in this Motion. This case presents four issues:

1. Whether the magazines in question are obscene within the literal meaning of Title 18, Section 1461, U. S. Code.

2. Whether the magazines in question are obscene within the literal meaning of Title 18, Section 1461, U. S. Code, as containing advertisements of where, how, from whom, and by what means obscene material may be obtained.

3. Whether the Post Office by the procedures it employed exercised unconstitutional prior restraint upon the magazines in issue.

4. Whether Title 18, Section 1461, U. S. Code is or is not constitutional.

So far as issues Numbers 1 and 4 are concerned, the statutory and constitutional questions coalesce. The Supreme Court in the *Roth* case, 354 U.S. 476, sustained pertinent Code Section 18 U.S. Code 1461 prior to its

Amendment on the ground that obscenity lies outside the protection of the constitutional guarantees of the First Amendment. The Supreme Court, in that case, thoroughly defined "obscenity." The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. Of course, the statute is to be interpreted as [fol. 80] broadly as the Constitution allows. In the administrative hearing before the Post Office judicial officer, it was the magazines on trial. The affidavit of Herman L. Womack, in support of the motion for temporary injunction herein, must be considered in relation to the transcript of the proceedings held at the Post Office, and is included herein by reference for the Court's consideration in deciding this motion. In the *Roth* case, the Supreme Court defined obscenity in terms of what it is, and in terms of what it is not. The expression of ideas that have the "slightest redeeming social importance" was held by the Supreme Court to be constitutionally protected. To be obscene, these magazines must be empty of any ideas of even the slightest redeeming social importance. The Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States. The Supreme Court in *Sunshine Book* v. *Summerfield*, 355 U. S. 372, and in *Mounts* v. *United States*, 355 U.S. 180, and in *One, Inc.* v. *Oleson*, 355 U. S. 371, has cited the *Roth* decision as its basis for reversing the lower courts. In the *Roth* decision, the prior law laid down in *Regina* v. *Hicklin*, L.R. 3, Q.B. 360, was discarded, and the test is no longer that which the Post Office argued through the judicial officer, i.e., that these magazines would appeal to the prurient interest of a particularly susceptible group. No one is able to assert with definiteness whether or not purchasers of these magazines are exclusively members of a particularly susceptible group, i.e., homosexuals, as set forth in the affidavit of Herman L. Womack. Plaintiffs argue these magazines must be judged according to their effects upon normal, healthy adults having applied contemporary community standards. This does not allow for a dissent in matters of taste even if the magazines in question could be considered as hateful to the prevailing climate

of public opinion; they would still have constitutional protection of the First Amendment. The Supreme Court's negation of the *Hicklin* rule surely does not mean that a Gallop Poll must be conducted nor may we consider the possible effect upon children or emotionally disturbed readers, illiterates, etc. If these magazines would not appeal to the prurient interest of an average, normal, adult they are not obscene and are constitutionally protected. Photographs portrayed in these magazines are not better, [fol. 81] and no worse than those portrayed in such leading magazines as *Esquire, Gentry, Rogue, Duke, and Playboy* magazines which the Post Office would not dare to argue are obscene. A salacious reader who might purchase one of these magazines from a book store is more likely to feel cheated than excited. But the effect of these magazines on such erratic or abnormal readers does not set the constitutional limit on freedom of speech and press. At the hearing before the judicial officer, counsel for the Post Office Department urged that the intent of the publisher should control. Actually, the intent of the publisher is irrelevant herein, because it is the magazines themselves which the Court must base its decision upon, surrounding circumstances being irrelevant.

Regarding Point 3, the Post Office conducted an unconstitutional prior restraint on these magazines. It first held the magazines to be nonmailable without notice or hearing allowed the publisher and deprived the plaintiffs of the use of the mails. After pressure exerted by this Court, the Post Office Department held a time-consuming hearing, the product of which was an Order contrary to the established law of the United States, which Order based upon the grounds given could have been propounded without any hearing at all. This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing at the Post Office Department is to delay action of this Court. The hearing examiner at the Post Office could not possibly qualify as an administrative expert. Plaintiffs assert that the Post Office has conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substan-

tive problems of determining whether or not the magazines are obscene.

Referring to the second point of this argument upon consideration by this Court of the decision of the Supreme Court in *Smith* v. *California*, it is clear that no publisher is responsible for the unknown actions of its advertisers any more than any book dealer is responsible for the contents of books for sale from his shelf of which he knows not the content. In all cases arising under Title 18, Section 1461, U. S. Code as set forth in his concurring opinion in the *Roth* case, by Chief Justice Warren page 495, the important element is that these things be done knowingly.

[fol. 82] Referring to the fourth point of this argument, appellant asserts that the 1958 Amendment 18 U.S. Code, Section 1461 is so vague and indefinite that it does not meet the requirements of due process of the Fifth Amendment in that, as amended, the pertinent language: "Whosoever * * * knowingly causes to be delivered by mail according to the direction thereon, or in the place at which it is directed to be delivered by the person to whom it is addressed * * * " is meaningless. Further, plaintiffs argue that the entire civil procedure followed by the Post Office based upon a criminal statute raises doubts of constitutionality. The fragile foundation on which the Post Office action rests must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. It is this Court's duty to defend substantive constitutional rights when attacked from a source itself of doubtful constitutional validity. There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations. It is the magazines before this Court that are on trial, not the publishers, although the Post Office has taken the contrary view, by attempting to prohibit from the mails any magazines in which Herman L. Womack has any interest since his conviction in this Court. Possibly the Post Office was not satisfied with the judgment of this Court and it is attempting to assert sanctions for

punishment upon Herman L. Womack exceeding this Court's judgment.

Respectfully submitted,

Stanley M. Dietz, Attorney for Plaintiffs

[Certificate of Service.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—August 17, 1960

This case having come on for hearing upon plaintiffs' motion for preliminary injunction and upon defendant's motion for summary judgment and plaintiffs' cross-motion for summary judgment, and the Court having considered [fol. 83] said motions, opposition thereto, affidavits and exhibits filed therewith, the pleadings herein, and having heard argument in open court, and it appearing to the Court that the order of defendant, Postmaster General, complained of, was supported by substantial evidence and that the action of defendant, Postmaster General, was not arbitrary or capricious; and it further appearing to the Court that there exists no genuine issue as to material fact and defendant is entitled to judgment as a matter of law, it is by the Court this 17th day of August, 1960,

Ordered that plaintiffs' motion for preliminary injunction be and it is hereby denied, and it is

Further Ordered that plaintiffs' cross-motion for summary judgment be and it is hereby denied, and it is

Further Ordered that defendant's motion for summary judgment be and it is hereby granted and that the complaint be and it is hereby dismissed.

George L. Hart, Jr., United States District Judge.

Seen:

Stanley M. Dietz, Attorney for Plaintiffs.

In United States District Court

Notice of Appeal—Filed October 10, 1960

Notice is hereby given this 10th day of October, 1960, that Manual Enterprises, Inc.; Trim Enterprises, Inc.; Grecian Guild, a body corporate, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of August, 1960, in favor of defendant, Arthur E. Summerfield, etc. against said plaintiff Manual Enterprises, Inc.; Trim Enterprises, Inc.; Grecian Guild, a body corporate.

Stanley M. Dietz, Attorney for Manual Enterprises, Inc., Trim Enterprises, Inc., Grecian Guild, a body corporate.

[Mail copies to: Post Office, U.S. Atty, Justice Dept.]

[fol. 84]

Government's Exhibit "A"

Post Office Department
Washington 25, D. C.

P.O.D. Docket No. 1/246

In the Matters Concerning

Manual Enterprises, Inc., et al.

at

Washington, D. C.

Appearances:

Stanley M. Dietz, Esq.
1406 G Street, N.W.
Washington, D. C.
Attorney for the
Mailer-Petitioner

Richard S. Farr, Esq.,
James F. Harding, Esq.
and Saul J. Mindel, Esq.
Attorneys for Complainant-
Respondent, Post Office
Department

DEPARTMENTAL DECISION—April 28, 1960

In the above matter the General Counsel's Office of the Post Office Department on April 5, 1960, made a finding to the effect that the April issue of the magazine MANUAL was non-mailable under the terms of 18 U.S.C. 1461 (Postal Manual 124.31) and on April 11, 1960, the Mailer-Petitioner herein filed an appeal from this finding and requested a formal hearing of all the issues involved.

On the same day, April 11, 1960, the Judicial Officer entered an order herein setting forth that since it appeared from the verified appeal that the matter offered for mailing was of substantial value and quantity that the General [fol. 85] Counsel should initiate forthwith a complaint under the Post Office Department Rules of Practice and Proceedings Relative to Mailability.

On April 14, 1960, the General Counsel filed a complaint in which they alleged that certain parcels containing magazines placed in the mail at Alexandria, Virginia on March 25, 1960, on behalf of Manual Enterprises were non-mailable under 18 U.S.C. 1461, Postal Manual 124.31 and that 255 copies of the April 1960 issue of the magazine MANUAL, 75 copies of the May 1960 issue of the magazine TRIM and 75 copies of the May 1960 issue of the magazine GRECIAN GUILD PICTORIAL were obscene, lewd, lascivious and indecent as the dominant effect of each, considering pictorial and textual context taken as a whole, appeals to the prurient interests of the audience to whom they are intended to be directed or disseminated. A hearing on said complaint was set for April 21, 1960, and the matter assigned to a Hearing Examiner.

On April 14, 1960, the General Counsel's office, Complainant herein, moved to strike from the caption of this case "FIZEEK ENTERPRISES, INC." which was named

in this proceeding because of its inclusion as one of the plaintiffs in the related court proceeding *Manual Enterprises, Inc., et al.* v. *Summerfield*, U.S.D.C., D.C. Civil Action No. 1082-60, and for the further reason that there were no copies of FIZEEK magazine contained in the parcels presently withheld from dispatch as recited in the original complaint herein. This motion was granted.

On April 18, 1960, the Matter-Petitioner filed what was entitled appeal of TRIM ENTERPRISES, INC. and GRECIAN GUILD, a body corporate from the finding of the General Counsel's Office of the Post Office Department of April 7, 1960, and on April 18, 1960, the Complainant [fol. 86] filed a motion to amend the complaint by adding at the end of the first paragraph "and that said magazines provide information as to where, how and from whom obscene pictures may be obtained." Such amendment is allowed.

On April 25, 1960, an order which had been entered in the *Manual Enterprises, Inc., et al.*, plaintiff v. *Arthur E. Summerfield*, defendant, Civil Action No. 1082-60, in the United States District Court for the District of Columbia and which had been filed in said court on April 14, 1960, was received by the Judicial Officer and made a part of this file. In this order it appears that the motion of the plaintiff in that case for a preliminary and permanent injunction was denied by the District Court and the complaint was dismissed without prejudice with the proviso "that if the Post Office Department has not acted finally and completely in the matter by April 28, 1960, the plaintiff may seek further relief from the court."

On April 25, 1960, a stipulation of procedures signed by both parties was filed herein in which MANUAL ENTERPRISES, INC. et al., P.O.D. Docket No. I-246 and FIZEEK ENTERPRISES, INC., P.O.D. Docket No. I-235 were consolidated for hearing, which hearing it was agreed therein would be presided over by the Judicial Officer and at that hearing testimony and evidence would be received on the mailability of FIZEEK as well as the magazines MANUAL, TRIM, and GRECIAN GUILD PICTORIAL and that the questions and issues of fact and law involved in the matter of the application of FIZEEK for second-class entry would

be heard at a subsequent date to be determined by agreement by the parties and that the Judicial Officer shall enter two separate orders—one dealing with the mailability question on the issues of MANUAL, TRIM and GRECIAN GUILD PICTORIAL now being withheld from dispatch [fol. 87] from the Alexandria, Virginia, Post Office and the other order dealing with the application of FIZEEK for second-class entry. Further that the transcript for the consolidated hearings shall remain as a part of the physical record in Docket No. 1246 and would be incorporated by reference in pertinent parts in the record in the FIZEEK second-class entry proceeding (P.O.D. Docket No. 1235), and that the Judicial Officer enter his final orders herein without the filing of exceptions by the parties.

In accordance with said stipulation and the pleadings on file herein, the Departmental Decision in this matter will be confined to the question of mailability of the magazines TRIM, MANUAL and GRECIAN GUILD PICTORIAL, and the questions and issues involved in the application for second-class entry for the several issues of FIZEEK magazines shall be subject to a separate Departmental Decision in that matter following further hearing on the application for second-class entry therein.

Full and complete hearings were had before the Judicial Officer on April 21, 22 and 25 and on both April 21st and the 25th the hearings ran several hours past the usual time for adjournment and into the early evening hours in an effort to expedite and conclude the hearings so as to meet the spirit of the order issued by the District Court as above set forth.

Numerous exhibits were entered by both parties—the Mailer-Petitioner having introduced copies of the magazines in question here as exhibits numbered one through eleven—the first four of which were magazines involved in this decision and the balance being copies of the magazine FIZEEK which is concerned in the second-class entry case as above set forth.

[fol. 88] Expert witnesses were called on both sides. The Respondent-Complainant produced Dr. Frank Caprio, a practicing psychiatrist who has had considerable experience in the treatment of homosexuals and who testified at

length regarding the effect of the pictures in the magazine in which the subjects were posed in such a fashion as to focus attention on the genitals or buttocks of the male subjects and the emphasis thereon was heightened by tight revealing coverings, by their postures, by the contrasting dress of the subjects of pictures on the same or opposite pages and by the overall context of the publications. Dr. Caprio further testified that the readers of said publications would consist of male homosexuals and that these publications would have a malevolent effect upon some adolescent males should they fall into their hands.

The testimony of Dr. Caprio was supported also by the testimony of Dr. Joseph D. McGovern, a psychologist, and it was stipulated between the parties in the interest of expediting the hearing that another witness of the Respondent-Complainant herein, Dr. John H. Cavanaugh, a physician, who is also a psychiatrist, would testify to the same facts and opinions as did Dr. Caprio.

The Mailer-Petitioner produced Dr. Medrad Miller, as an expert witness whose practice involved psychiatry in the treatment of homosexuals. Dr. Miller, who examined all the books in evidence, testified that the average normal person would not be interested in this type of publication — that these publications would not appeal to the prurient interests of the average normal person and that the books themselves would not make a homosexual out of an ordinary person. Dr. Miller further testified that the average [fol. 89] normal person would not be likely to purchase these publications but that some homosexuals would be interested in them. The Mailer-Petitioner likewise produced Dr. S. Gordon Link, a non-medical psycho-therapist who gave as part of his qualifications the fact that he was a practicing psychologist and was a fellow in the American Association of Social Psychiatry. He likewise testified that the dominant theme of the magazines in question here would not appeal to the prurient interest of the average person and that he did not believe any of these books would cause a young man to become a homosexual and that it would have no effect on the average adult but might conceivably have an effect on homosexuals. He admitting that the focusing of the attention on buttocks would have

an appeal to a homosexual and that some homosexuals might order the pictures advertised in the magazines and that the context of these magazines was important and that it would have an accumulative effect upon homosexuals.

Harry J. Simon, Postal Inspector testified he met Mr. H. Lynn Womack, the publisher of these magazines and owner of the organization of the Mailer-Petitioner in this case in March of 1959, when he, Mr. Womack, came to the witness' office to discuss the magazine TRIM. Mr. Simon at that time advised Mr. Womack that some of the advertisers in this magazine had been convicted of sending obscene matters through the mail and suggested that he, Mr. Womack, might be violating the law by furnishing information in his publications as to where obscene material might be obtained. The witness further testified that he discussed the April 1959 issue of FIZEEK and Mr. Womack admitted that this magazine was purchased by homosexuals. The witness further testified that on July 31, 1959, accom- [fol. 90] panied by Boyd Fielder, a Postal Inspector, he met Mr. Womack in connection with investigations being conducted on Continental Artists of which Mr. Womack is the sole owner.

There was considerable testimony of Post Office Inspectors and employees and many exhibits were introduced which tended to show that through the ads carried in the magazines here in question, the printing in each issue of a directory providing information as to where photographs and pictures of the type appearing in these magazines could be obtained tended to furnish information to show where obscene material could be obtained. The evidence also revealed how, following receipt of the initial order of pictures and photographs of the kind and type appearing in these publications, there would be follow-up circulars and solicitations from the advertisers, the persons or firms furnishing the pictures or those listed in the Directory, for other and further nude male pictures from these advertisers or others which would have a prurient interest to homosexuals. These procedures led finally to the receipt of *what is known as hard-core pornography* in the shape of photographs, sketches, pictures and colored slides of males engaged in sex acts with each other, which no one

would question were of the type that would appeal to the prurient interests of anyone who would have any desire to look at them.

It appears to the Judicial Officer that the record in this case clearly shows that the issues of the magazines TRIM, MANUAL and GRECIAN GUILD PICTORIAL in evidence here (Exhibits 1, 2, 3 and 4) consist almost entirely of photographs of young men in nude or practically nude [fol. 91] poses handled in such a manner as to focus attention on their genitals or buttocks or to emphasize these parts by tight revealing coverings, by the posture of the models, by contrasting dress on the same or opposite pages and by the overall context of the respective publications.

It further appears to the Judicial Officer that the contents of these magazines would not appeal to the ordinary male adult, that he would have no interest in them and would not buy them under ordinary circumstances and that the readers of these publications consist almost entirely of male homosexuals and possibly a few adolescent males and that these magazines would appeal to the prurient interest of those who do read them. Further, the publisher has admitted that the magazines are knowingly published to appeal to the male homosexual group.

It further appears to the Judicial Officer that there is no amount of literary, scientific or other material in these issues of the publications which would in any way offset the effect of the main contents of these magazines, namely, the published pictures.

It further appears to the Judicial Officer that the advertising contained in the several issues placed in evidence herein is of the same general character as the publication itself and would have the same general appeal to homosexuals and contains an implied promise of obscene pictures to those answering such ads and that in fact the pictures furnished by the advertisers in the magazines have a predominant appeal to the prurient interest of the male homosexual as do the pictures contained in the magazines themselves which as before stated is a prurient one so far as the homosexual is concerned and has the effect of sexual excitement to the male homosexual.

[fol. 92] It further appears to the Judicial Officer that the average reader of these magazines is the male homosexual and that each of the issues in evidence here considered fully as a whole in each instance appeals to the prurient interest of the average reader of such magazines and that the average male adolescent who might be attracted to each of the issues here involved would be in danger of the possible luring of such an adolescent reader into the abnormal paths of the homosexual.

Counsel for the Mailer-Petitioner contends that in order to be non-mailable these magazines would have to appeal to the prurient interests of the average normal person in the community. With this contention, I cannot agree. If they appeal to the prurient interest of those male homosexuals for whom they are admittedly published, those who actually purchase and read them then those whom they would be unlikely to reach and for whom they would have no interest, who would not purchase or read them, would not furnish a standard to judge the appeal they would have to those they are likely to reach. It is the effect they have upon the audience for whom they are published and who are interested in them and who would read them that is the important issue here presented.

The publisher of the issues here involved has deliberately planned these publications so that they would appeal to the male homosexual audience and thereby this particular group becomes the predominant audience who would buy and read these publications. Thus, the male homosexual becomes the "average" reader and these magazines do appeal to the prurient interest of the group who purchase and read these publications.

[fol. 93] It further appears to the Judicial Officer that the ads in the publications here involved are likewise clearly designed so as to attract the male homosexual and to furnish him with names and addresses where nude male pictures in poses and conditions which would appeal to his prurient interest may be obtained; that the pictures thus obtained would appeal to the prurient interest of such male homosexuals as would read and answer the ads therein contained and if followed up and fully pursued would

eventually lead to the procurement of so-called "hard-core" pornographic material.

The Judicial Officer has had the benefit of proposed findings of fact and conclusions of law submitted by the Mailer-Petitioner and likewise of those submitted by the Complainant-Respondent and in this connection the argument attached to the findings and conclusions of the Complainant-Respondent contains a very exhaustive and quite complete statement of the law covering the legal questions here presented and has been of great benefit to the Judicial Officer in conserving time and research in order that a speedy Departmental Decision in accordance with the Rules of Practice in these hearings as well as the wishes of the District Court might be reached.

I therefore determine that the several issues of the magazines here involved and each of them is obscene, lewd, lascivious and indecent so as to render each and all of them non-mailable under 18 U.S.C. 1461 for the reason they have as their dominant theme and effect taken as a whole an appeal to prurient interest considering their effect upon the average reader for whom they are designed and published and who are the special audience to whom they are directed, and to whom the magazines are sold and by whom they are read.

[fol. 94] I further find that the magazines give information as to where, how and from whom obscene materials may be obtained in violation of 18 U.S.C. 1461 as determined by the tenor of the advertisements and by the kind and nature of the pictures furnished pursuant thereto as disclosed by the evidence and exhibits in the record.

The proposed findings of fact and conclusions of law including the argument, which contains an excellent brief of the law pertinent hereto, as submitted by the Complainant-Respondent are hereby adopted and the proposed finding of fact numbered three submitted by the Mailer-Petitioner as well as conclusions of law numbers one and two submitted by him are hereby rejected. Mailer-Petitioner's proposed findings of fact numbers 1 and 2 are covered by similar findings in those submitted by Complainant-Respondent and are adopted.

I therefore find that all of the magazines or publications here involved; namely, the April 1960 issue of MANUAL (Exhibit 1), the May 1960 issue of TRIM (Exhibit 2), the May 1960 issue of GRECIAN GUILD PICTORIAL (Exhibit 3) and the March 1960 issue of TRIM (Exhibit 4) are nonmailable under 18 U.S.C. 1461.

/s/ RAYMOND J. KELLY
Raymond J. Kelly
Judicial Officer

[fol. 95]

GOVERNMENT'S EXHIBIT G

TRIM *Young America's Favorite Physique Publication*

P.O. Box 385
Washington 4, D.C.
CO 5-5540

10 September 1958

Mercury Photographic Service
P.O. Box 2
Norfolk, Virginia

Dear Bob:

Thank you very much for your interesting cooperation. I have selected one print of Frankie Smoot for the November issue of TRIM.

Ricky Ojeda is a very good model and so is Joe Fabio. The Underwood Guild sent me almost nothing—what they sent me has been printed, with the exception of two prints which I have on hand. This is good, in a way, in that you do not have to worry about duplicating anything from the negatives which you bought from them.

In looking over your catalog, I would say that the following boys appear to be very good candidates in TRIM: David, Steve, Danny, Buster, Bob Stevens, and Buddy Hobson. These are all younger and, unless your descriptions are too misleading, are the kinds of models toward

which TRIM is admittingly oriented. Underwood sent me a couple of pretty sad prints on Bill Westley. There is a great difference between "young" and "Sexy." Westley, if he has been photographed properly, has the potential sex appeal and drawing power that is characteristic of so many of the Vulcan models. In any case if we follow through with our plan of your sending me the selector catalogs, we can save time, money and effort all around.

In as much as you are just launching your own business, I will proffer a couple of observations. In 1958, physique fans want their "truck driver types" already cleaned up, showered, and ready for bed. You will find that Smoot will not be a great seller because he is just too cluttered up. Secondly, it is absolutely essential that the models have pretty faces and a personality not totally unrelated to sex appeal. Of the three boys which you have sent to me, Ojeda is your best bet. I may be wrong and offer the above only in the hope of assisting you rather than appearing dogmatic. Let me hear from you.

Cordially,

/s/ Lynn
Lynn

[fol. 96] (Envelope)

T R I M
P.O. Box 385
Washington 4, D.C.

Mercury Photographic Service
P. O. Box 2
Norfolk, Virginia

[fol. 97]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,072

MANUAL ENTERPRISES, INC., *et al.*, Appellants,

v.

J. EDWARD DAY, Postmaster General, Appellee.

Appeal From the United States District Court for the District of Columbia

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OPINION—March 23, 1961

Mr. Stanley M. Dietz for appellants.

Mr. Donald Smith, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee. Mr. Frank Q. Nebeker, Assistant United States Attorney, also entered an appearance for appellee.

Before Fahy, Danaher and Bastian, Circuit Judges.

BASTIAN, *Circuit Judge*: In April, 1960, postal officials determined that three magazines, "Manual," "Trim," and "Grecian Guild Pictorial," (hereinafter referred to as appellants), were non-mailable under 18 U.S.C. ¶ 1461 as being obscene and as conveying information as to how and where obscene matter might be obtained. Pursuant to this determination, copies of the magazines were withheld for dispatch. Shortly thereafter an administrative [fol. 98] hearing was conducted, in which appellants participated, which ended adversely to appellants. Suit for injunctive relief was then filed in District Court. Appellants' motion for preliminary injunction was denied. On cross-motions for summary judgment, appellants' was denied, and appellee's was granted. This appeal followed.

The magazines in question are physique magazines, composed almost exclusively of photographs of nearly nude

male models. Each photograph is accompanied by a brief caption giving the names of the model and photographer. Each issue also contains an index listing the photographers who have contributed to that magazine and a few advertisements from photographers and studios offering collections of nude photographs.

At the administrative hearing psychiatrists testified in great detail, explaining how and why the poses used in most of the pictures and the clothing worn by the models would arouse great prurient interest in homosexuals. Psychiatric testimony was also given to the effect that certain objects (swords and chains) used in some of the pictures were primary symbols of sexual fantasies of deviants within the homosexual group.

A postal inspector testified that, using an assumed name, he submitted orders to some of appellants' advertisers and received from them photographs of nude males with the pubic area exposed to view. He further testified that, in his experience, additional orders would produce photographs progressively more lascivious. Investigations at the studios which mailed the particular photographs here involved resulted in the discovery of what was termed "hard core pornography," photographs of groups of nude males engaged in homosexual activities.

Appellants contend that these magazines are body-building magazines, and that the publishers have no way of knowing whether newsstand sales are made to homosexuals or body-building enthusiasts. They further contend that they can not be charged with the photographs found in the course of the investigations because they were not sent through the mails and that the photographs which were actually sent are not obscene because nudity as such is not obscene.

[fol. 99] We think there was substantial evidence on the administrative record to support the conclusion that these magazines were intended for homosexuals. Overlooking the testimony that Herman Womack (the owner of two of the magazines and the publisher of all three) actually admitted such intent, the expert testimony as to the effect of the published pictures on homosexuals coupled with the obvious lack of relationship of the "posing straps," heavy boots, helmets, swords, and chains to any interest

in body-building, we think, amply supports the inference that these pictures were deliberately published because of their effect upon homosexuals.

Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of *Roth* v. *United States*, 354 U.S. 476 (1957), the so-called "average person in the community" test. It seems to us that the real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence before the administrative body, we think that "the average member of the community" would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that these magazines were obscene within the meaning of the statute is therefore affirmed.

The testimony of the postal inspector as to his experience in the progressive nature of the material sent through the mails by the advertisers, together with the photographs actually so sent and those seized at the same studios, we think, furnishes substantial evidence for the conclusion that the advertisements in these magazines did give in-[fol. 100] formation with respect to where, how and from whom obscene matter could be obtained. The foregoing omits consideration of whether the photographs actually sent through the mails were obscene. A prior decision of this court has held such matter to be obscene. See *Womack* v. *United States*, No. 15,749 —— U.S.App.D.C. ——, —— F2d —— (decided Jan. 12, 1961). This finding of the administrative body is likewise affirmed.

The judgment of the District Court is therefore

Affirmed.

FAHY, *Circuit Judge, concurs* in the result.

[fol. 101]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

Civil 1450-60

No. 16,072

MANUAL ENTERPRISES, INC., *et al.*, Appellants,

v.

J. EDWARD DAY, Postmaster General, Appellee.

Appeal From the United States District Court for the District of Columbia

---

Before: Fahy, Danaher and Bastian, Circuit Judges.

JUDGMENT—March 23, 1961

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideraton Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated: March 23, 1961.

Circuit Judge Fahy concurs in the result.

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 104]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.